

Compromise and Dissent: Toward a Model of Imperfect Legitimacy

Evan Robert Farr
Eugene, Oregon

Master of Arts, University of Virginia, 2010
Bachelor of Arts, Lewis & Clark College, 2006

A Dissertation presented to the Graduate Faculty
of the University of Virginia in Candidacy for the Degree of
Doctor of Philosophy

Woodrow Wilson Department of Politics

University of Virginia
May, 2014

For Bob and Clifton

Table of Contents

Acknowledgements.....	4
Introduction: Three scenes.....	6
1: <i>Setting the stage</i>	9
2: <i>Democratic theory and dissent</i>	13
3: <i>Compromise and dissent as a third alternative</i>	17
4: <i>The (N) principle in action</i>	22
Chapter 1: Deep dissent—a democratic practice.....	27
1.1: <i>The nature of deep dissent</i>	27
1.2: <i>Pluralism, self understanding, and world</i>	34
1.3: <i>Does deep dissent inhibit legitimacy?</i>	43
Chapter 2: Dissent and compromise: unlikely bedfellows.....	49
2.1: <i>The nature of compromise</i>	51
2.2: <i>Compromise and dissent</i>	54
2.3: <i>How to compromise with an occupier</i>	64
2.3: <i>Compromise in the literature</i>	75
Chapter 3: Consensus and dissent: compromise and deliberative democracy.....	81
3.1: <i>Habermas’s tension</i>	83
3.2: <i>Forst’s right to justification</i>	93
3.3: <i>Compromise and dissent in deliberative democracy</i>	102
Chapter 4: Dissensus and dissent: compromise and agonistic democracy.....	107
4.1: <i>Power of the agonistic critique</i>	109
4.2: <i>Problems with the agonistic paradigm</i>	117
4.3: <i>Compromise and dissent as a third alternative</i>	121
Chapter 5: Deferring closure in the land of the future: compromise and the <i>Bolsa Família</i> program in Brazil.....	133
5.1: <i>The PT emerges: a party and a movement</i>	135
5.2: <i>The PT in power: the Bolsa Família and political compromise</i>	139
5.3: <i>The PT as establishment: Dilma, Mensalão, and the protests of 2013</i>	143
5.4: <i>Conclusion: Three radical models of democracy</i>	147

Acknowledgements

This dissertation would not have been possible without the assistance, feedback, and at times succor of many people. First and foremost, I want to thank my advisor and dissertation committee chair, Stephen K. White. It is difficult to overstate how important he has been to both the development of this project and to my own personal intellectual growth. I have been immensely fortunate to have him as both a mentor and a friend.

I would also like to thank the other members of my dissertation committee: Colin Bird (who has helped to keep my argument rigorous and my mind sane), Lawrie Balfour (who has consistently pushed me to keep in mind what really *matters* in the abstract concepts of compromise and dissent), and Tal Brewer (who agreed to be a part of this project during a year of towering professional obligations).

Outside of the committee, I also owe a great deal to Jennifer Rubenstein and Lynn Sanders, who co-led the graduate development seminar in the spring semesters of 2011 and 2013. Their trenchant commentaries on earlier versions of this dissertation were incredibly helpful at two crucial stages of the writing process—the opening and the middlegame. I am also grateful for the other participants in the development seminar, who were likewise crucial to the clarity, depth, and rigor of this project.

I also wish to thank George Klosko, Holloway Sparks, Brandon Morgan-Olsen, and Sam Chambers, all of whom gave excellent commentary on earlier versions of various chapters of this dissertation, as well as a host of current and former UVA faculty members including Melvin Rogers, Loren Lomasky, Chris Lebron, Michael Smith, and Micah Schwartzman. I also thank my fellow current and former graduate students in the UVA departments of Politics and Philosophy, including (in no particular order) Claire Timperley, Regev Ben Jacob, Callum

Ingram, Colin KIELTY, William Sbach, David Novitsky, William Umphres, Bryan Cwik, Derek King, Justin Rose, Greta Snyder, Sara Henary, Nadim Khoury, Kiran Banerjee, and Elizabeth Kaknes. I particularly want to thank Mary (Molly) Scudder, who has become like a sister to me since we both came to UVA six years ago, and without whom graduate school would have been unimaginably different.

Finally, I want to thank my friends and family who have put up with me constantly yammering about Habermas and compromise over the past several years, including my parents Pat and Debi, my brother Patrick, my sister Hayley, my late father-in-law Clifton, my late grandfather Bob, Lois Smith, Eleanor, Diggory, Logan Leff, Chris Cornelius, Alec Hickmott, Mary Hicks, Ryan Bibler, Trevor Hiblar, Emily Senefeld, John Terry, Sam Murphy, Leticia Assunção, Davi Araújo Alves, Katherine Brodbeck, Guilherme Santos Mello, and Tom Butcher. And most importantly of all, I thank my darling wife, Anne Megan Daniels, without whom nothing at all would be possible.

Introduction: Three scenes

According to *Time* magazine, 2011 was the year of the protester.

The abstract “Protester” was the feature of the magazine’s annual “Person of the Year” issue, joining past honorees that have included Mahatma Gandhi, Franklin Roosevelt, and Martin Luther King, Jr. (as well as Hitler, Stalin, and Khomeini). The Egyptian and Tunisian revolutions, the Occupy movement in North America, and liberal opposition to Vladimir Putin in Russia, they wrote, marked the advent of a new and significant world historical moment: “‘Massive and effective street protest’ was a global oxymoron until—suddenly, shockingly—starting exactly a year ago, it became the defining trope of our times. And the protester once again became a maker of history.”¹

If anything, *Time* may have jumped the gun, for two (perhaps contradictory) reasons. First, the deposal and arrest of Egypt’s democratically elected president Mohammed Morsi underscored the fragility of mass politics, particularly in societies that retain politicized security states. While the catalyst of Egypt’s June 30 Revolution was liberals taking to the streets, its culmination was the military taking to the tanks. As of this writing, Field Marshall Abdel Fattah el-Sisi dominates the country’s politics—and is expected to run for president in the next election. While liberals and Islamists united against Hosni Mubarak in Tahrir Square in 2011, they are now bitterly divided against each other. And the role of mass politics in Egypt is as unclear as ever.

Second, *Time* extolled the protester two years before a new round of large-scale demonstrations that began in the summer of 2013. In Brazil, what began as a movement

¹ Kurt Anderson, “The Protester,” *Time*, December 14, 2011
<http://content.time.com/time/specials/packages/article/0,28804,2101745_2102132_2102373,00.html>.

opposing a proposal to raise bus fares evolved into a nationwide, public expression of generalized angst against the country's inequality, corruption, and measly public services. In Turkey, a similar transformation occurred, where protests against a government-backed plan to build an opulent shopping mall on a greenspace turned into a much more wide-ranging indictment of Prime Minister Recep Tayyip Erdogan's Islamist government by secular liberals. And in Ukraine, an ongoing dispute over the country's economic relationship with Western Europe and Russia has evolved into a full-blown revolution, with geopolitical stakes that are reminiscent of the Cold War.

This dissertation attempts to reconcile these and other protest movements—which I characterize as “deep dissent”—with the ideal of democratic legitimacy. In general, deliberative democracy (the dominant paradigm in democratic theory) has had difficulty reconciling its emphasis on rationally motivated consensus as the basis of legitimacy with the presence of deep and irreconcilable difference. The type of communication associated with deliberative democracy, after all, is not just free-wheeling discourse; rather, democratic deliberation is meant to justify the coercive power of the state through unconstrained communicators agreeing that it is justified for the *same reasons*. When a political community is divided into groups that hold fundamentally different conceptions of the role of the state and their responsibilities as citizens, agreement beyond mere *modus vivendi* becomes impossible.

Agonistic and radical democracy, on the other hand, is explicitly designed to account for deep dissent. Agonists, including Chantal Mouffe and William E. Connolly, emphasize that deliberative democracy is incoherent precisely *because* it discounts the incommensurable conflicts that mark democratic society. Rather than being viewed as a problem to be solved, however, agonists urge democrats to embrace the deep difference of plural (and pluralizing)

societies as a resource for democratic engagement. Democracy is an unpredictable, precarious, and radically contingent enterprise, but that unpredictability, precariousness, and contingency is not something that can be ironed out through an ideal deliberative procedure. Nor should it be: in their work, radical democrats such as Jacques Rancière and Sheldon Wolin highlight the opportunity that a democracy envisioned (in Claude Lefort's words) as the "dissolution of the markers of certainty" provides.² If democracy is understood as a system (or more properly for the radicals, a moment) of human freedom, then greater uncertainty correlates with greater democracy: rather than sanitize the political into a set of discursive rules, the agonists and the radicals want to allow democracy to flourish in all its messy, incoherent, and sometimes dangerous guises.

While this is naturally more consistent with deep dissent, however, I argue it also drains the element of judgment from democratic theory. The agonists' and radicals' embrace of difference and contingency comes at the cost of jettisoning an affirmative model of democratic legitimacy. This is particularly problematic because, despite eschewing an explicit appeal to principles of justice or rules of discourse, agonistic and radical democracy retain an unspoken normative core: for Rancière, there is something *good* about the disruption of the logic of the *arkhê*. For Mouffe, there is something *bad* about hypostatizing "preconstituted identities" without accounting for the pluralization that accompanies pluralism.³ When it lacks an affirmative alternative, their critical account of democracy is at best rhetorical, and at worst empty descriptivism.

In this dissertation I present an alternative to both schools of democratic thought, one I call "compromise and dissent." Unlike Habermasian deliberative democracy, I position it as an

² Claude Lefort, *Democracy and Political Theory*, trans. David Macey (Cambridge, UK: Polity Press, 1988): 19.

³ Chantal Mouffe, "Deliberative Democracy or Agonistic Pluralism?" *Social Research* 66 (1999): p. 753.

explicitly imperfect model of democratic legitimacy. Since democracy is an activity that is carried out by flesh-and-blood humans, I have excised ideal theory from the model entirely. At the same time, however, I have kept an account of normative legitimacy, at least insofar as it is possible to distinguish more legitimate democratic decisions from less legitimate ones. This is accomplished by envisioning the decisions reached under the conditions of deep dissent as provisional compromises whose legitimacy can be adjudicated according to the extent to which they are inclusive of the *next affected* (as opposed to Habermas’s “all affected”) party. Final justification is deferred, as there is no way to judge whether a law or norm is legitimate in the status quo; rather, the normative validity of discourses projects into the future.

In the remainder of this introduction, I will briefly explain how compromise and dissent functions—and how it differs from deliberative or agonistic democracy—by referring to three democratic “scenes” from recent American political history: the Occupy Wall Street movement, Barack Obama’s second inaugural address, and Edward Snowden’s revelations of confidential NSA spying operations. While its rivals can only explain the democratic character of some of these scenes, I will argue, compromise and dissent can explain all three. This will, I hope, illustrate the respects in which compromise and dissent is a more powerful articulation of democratic theory than what has been offered in the past.

1: Setting the stage

In the summer of 2011, the editors of *Adbusters* magazine invited its readers to participate in a distinctive new style of protest. While its concerns were material, it largely eschewed traditional class politics, instead posing the issue of inequality as a conflict between the “one percent” and the rest. While it was an unambiguously political movement, it refused to issue an official set of

grievances, operating on a consensus-based decision making model that prevented any orthodox doctrine from forming. And while at its core it comprised a group of people taking to the streets, instead of marching they occupied. On September 17, 2011, approximately one thousand people set up camp in Zuccotti Park in lower Manhattan, and Occupy Wall Street was born.

Sixteen months later, a different gathering occurred on the national mall in Washington, D.C. Once again, thousands of people gathered in a public space as a political expression, though this time they did not join together to voice their opposition to the status quo. Rather, they assembled to hear the second inaugural address of their country's president. Despite persistently high rates of unemployment, widening material inequality, and a campaign by opponents that was at times gut wrenchingly hateful, Barack Obama had been comfortably reelected, and his speech was a paean to the self conception of the American people that he believed was represented by his victory in November:

We believe that America's prosperity must rest upon the broad shoulders of a rising middle class. We know that America thrives when every person can find independence and pride in their work; when the wages of honest labor liberate families from the brink of hardship. We are true to our creed when a little girl born into the bleakest poverty knows that she has the same chance to succeed as anybody else, because she is an American; she is free, and she is equal, not just in the eyes of God but also in our own.⁴

Five months later, a much smaller gathering occurred. This one was not a mass of people physically gathering together, but a conversation in a Hong Kong hotel room between a low-level National Security Agency contractor and an American journalist working for the *Guardian* newspaper. In that interview, Edward Snowden explained why he had chosen to leak thousands of confidential documents pertaining to the NSA's massive (and heretofore undisclosed) surveillance activities—programs which indiscriminately swept up almost everything it was

⁴ Barack Obama, "Inaugural Address," January 21, 2013, White House Office of the Press Secretary <<http://www.whitehouse.gov/the-press-office/2013/01/21/inaugural-address-president-barack-obama>>.

possible to know about both American citizens and people living around the world, ostensibly as a means of detecting and preventing terrorism: “I think that the public is owed an explanation of the motivations behind the people who make these disclosures that are outside of the democratic model.” The NSA’s dragnet, he said, is “a fundamentally dangerous thing to democracy.”⁵

Superficially, each of these three scenes appears to be distinct from the others. Where Obama’s inauguration was triumphalist, Occupy and the Snowden revelations were dystopian. Where Occupy was a collective movement without a face, Obama and Snowden were the unambiguous stars of their scenes. And where Snowden justified his actions using reasons that were broadly libertarian, Obama and the Occupiers presented messages that were thoroughly egalitarian.

What links all three, however, is that each constituted a claim of democratic voice, and a radical one. The Occupiers not only presented themselves as the voice of the 99 percent—suggesting that democracy had been hijacked by a plutocratic elite—but also operated internally on a consensus model that was designed to ensure that all participants had an equal voice in the proceedings. Moreover, Occupy was an effort of democratizing a sphere (the financial system) that seemed to suffer from a deficit of participation; democracy, they suggested, was more than campaigns and elections, but also an ethos that should be expanded to other dimensions of collective life.

While Obama’s inaugural address was widely remarked upon as a return to “liberalism” for the Democratic Party, equally striking was the explicitly democratic rhetoric it employed. Obama presented himself not as an individual proposing programs for his second term in office, but as a distillation of the interests of American citizens. References to “I” were rare, while “we” (with the “we” being the entire American people) was used over seventy times. He portrayed his

⁵ Gabriel Rodriguez, “Edward Snowden Interview Transcript,” *PolicyMic*, June 9, 2013

voice not as his own, but as the voice of the demos:

My oath is not so different from the pledge we all make to the flag that waves above and that fills our hearts with pride.

They are the words of citizens and they represent our greatest hope. You and I, as citizens, have the power to set this country's course. You and I, as citizens, have the obligation to shape the debates of our time—not only with the votes we cast, but with the voices we lift in defense of our most ancient values and enduring ideals.⁶

While identifying with citizens is not a terribly novel thing for an elected official to do, it nevertheless contains a radical core in this instance; Obama casts democracy not as a system merely of representation, but of broad participation. The last sentence in the excerpt above is particularly notable in this regard, as the president is not promising to faithfully discharge the responsibility with which he has been trusted, but placing himself on the same plain as democratic citizens who “shape the debates of our time.”

Paradoxically, though Edward Snowden's leak was the most individual of any of the three scenes discussed above, it was also the most explicitly and radically democratic. While he presented himself as a sort of democratic facilitator in the first interview—with the leak intended to increase the transparency of government, leading to more informed decisions—he later characterized the leak as a democratic direct action, with Snowden adopting the role of the sovereign: “‘That whole question—who elected you?—inverts the model,’ he said. ‘They elected me. The overseers.’”

“Dianne Feinstein elected me when she asked softball questions” in committee hearings, he said. “Mike Rogers elected me when he kept these programs hidden... The system failed comprehensively, and each level of oversight, each level of responsibility that should have addressed this, abdicated their responsibility.

“It wasn't that they put it on me as an individual—that I'm uniquely qualified, an angel descending from the heavens—as they put it on someone, somewhere,” he

⁶ Obama, “Inaugural Address.”

said. “You have the capability, and you realize every other [person] sitting around the table has the same capability but they don’t do it. So somebody has to be first.”⁷

Like Sheldon Wolin or Jacques Rancière, Snowden is indicating that he understands democracy as something more than a regime of majority rule or political representation. Rather, democracy is a style of politics, and one through which individuals like Snowden or groups like Occupy must claim the right to rule through sometimes extralegal means. Snowden wasn’t personally elected so much as we all were.

2: Democratic theory and dissent

While agonistic and deliberative democratic theory can each explain components of the scenarios described above, neither can adequately account for all of them in their entirety. While the agonists can justify the type of dissent exercised by the Occupy protestors and Snowden, both are more difficult to reconcile with deliberative democracy. And while deliberative democrats can evaluate the claims to legitimacy in Obama’s second inaugural address, there is no means for this type of evaluation in the agonistic/radical program.

Occupy Wall Street fits well with both the radical and the agonistic democratic paradigms, particularly when the Occupiers’ tactics and rhetoric is compared to Jacques Rancière’s notion of *arkhê*. “The people,” he argues, “exists only as a rupture with the logic of *arkhê*, a rupture with the logic of commencement/commandment.”⁸ Democracy, as the paramount expression of the political, occurs when a people “inscribes the count of the

⁷ Barton Gellman, “Edward Snowden, after months of NSA revelations, says his mission’s accomplished,” *Washington Post*, December 23, 2013 <http://www.washingtonpost.com/world/national-security/edward-snowden-after-months-of-nsa-revelations-says-his-missions-accomplished/2013/12/23/49fc36de-6c1c-11e3-a523-fe73f0ff6b8d_story.html>.

⁸ Jacques Rancière, “Ten Theses on Politics,” in *Dissensus: Politics and Aesthetics*, ed. and trans. Steven Corcoran (London: Bloomsbury, 2010): p. 33.

uncounted, or part of those who have no part—that is, in the last instance, the equality of speaking beings without which inequality itself is inconceivable.”⁹ Translated, this suggests that democracy entails not public deliberation followed by voting, but the assertion of rights for a category of person that was unrecognized before they made themselves counted as speaking beings. Something like this happened with Occupy: the protestors in Zuccotti Park articulated a form of political subjectivity that was in important respects new, namely the “99 percent.” Moreover, despite widespread judgments to the contrary, in this respect Occupy was actually a success, as the “strength of [the Rights of Man] lies in the back-and-forth movement between the initial inscription of the right and the dissensual stage on which it is put to the test,” and if the protestors made “something of these rights to construct a dissensus against the denial of rights they suffer, they really have these rights.”¹⁰ The Occupy movement shouldn’t be interpreted as reaching toward this or that measure of policy, but as a rupture in the logic of American capitalism: at the point that beneficiaries of the status quo were required to answer the critiques leveled by their opponents, their position as uniquely qualified commentators evaporated. Even if what Rancière calls the “police” order never changed (through new financial regulation, for instance), the sense in which Occupy “changed the conversation” was a substantial shift from the status quo.

As I alluded to in the previous section, Edward Snowden actually used explicit language in interviews that aligned himself with the radical democrats. In “Fugitive Democracy,” Sheldon Wolin contrasts his own understanding of democracy with the one offered by other democratic theorists (as well as the one that is implied by the tendency in ordinary language to refer to states as “democracies” or “non-democracies”) by saying that “any conception of democracy grounded

⁹ Ibid.

¹⁰ Jacques Rancière, “Who Is the Subject of the Rights of Man?” in *Dissensus: On Politics and Aesthetics*, ed. and trans. Steven Corcoran (London: Bloomsbury, 2010): p. 71.

in the citizen-as-actor and politics-as-episodic is incompatible with the modern choice of the state as the fixed center of political life and the corollary conception of politics as continuous activity organized around a single dominating objective, control of, or influence over the state apparatus.”¹¹ In Wolin’s view, democracy should be “reconceived as something other than a form of government: as a mode of being that is conditioned by bitter experience, doomed to succeed only temporarily, but is a recurrent possibility as long as the memory of the political survives.”¹² If democracy is understood in these terms, Snowden’s revelation was a democratic act par excellence: his claim was that his lack of institutional imprimatur made him no less “elect” than the officially elected officials who represented him in Congress, and the leak was an episode of democracy as a “mode of being” outside the halls of power.

Both of these characterizations are at odds with the deliberative paradigm, which is fundamentally a set of procedures to justify (or, of course, withhold justification from) coercive acts of the state. Not only is this premised on the democracy-as-regime characterization that Wolin (and implicitly Snowden) rejects, but it also requires dissenters like Snowden to offer *reasons* for rejecting a policy rather than skipping directly to civil disobedience—and reasons that can be acceptable by all participants in a practical discourse. The Snowden leak can conceivably be integrated into the discourse theoretic paradigm through Habermas’s discussion of civil disobedience (the idea being that his release of NSA documents may have constituted an experiment meant to judge the validity of the contemporary national security state), but (as I will explain in the third chapter of this dissertation), there is tension between Habermas’s account of civil disobedience and his larger communicative paradigm. Civil disobedience itself is far from a neat fit with deliberative democracy.

¹¹ Sheldon Wolin, “Fugitive Democracy,” in *Democracy and Difference: Contesting the Boundaries of the Political*, ed. Seyla Benhabib (Princeton: Princeton University Press, 1996): p. 42.

¹² *Ibid.*: 43.

Most importantly, both of these scenes are examples of what I characterize as *deep dissent*: they are the type of disputes that turn on a fundamental disagreement over the self-understanding of the democratic order. This is particularly difficult for deliberative democrats to handle, as it is a scenario in which different parties in a practical discourse are more likely to lack a common frame of reference; under conditions of deep dissent, the discourse itself will be difficult to get off the ground. In the Occupy example, a conversation between a member of the movement and a financial executive would have run aground on the irreconcilable assumptions that each interlocutor held about the meaning of freedom, the nature of desert, and the moral significance of inequality. In the NSA example, a conversation between Snowden and House Intelligence Committee chairman Mike Rogers would have experienced friction over the classic question of the relative importance of liberty and security; Snowden's leak was motivated by a suspicion of the national security state that would be incomprehensible to someone like Rogers.

Deliberative democracy is much better equipped, however, to analyze the Obama example. The claims that Obama made about the policies and principles supported by the American people can be compared against the extent to which they have been supported by a rationally motivated consensus that developed out of a vibrant public sphere. In Habermasian terms, we should be able to identify the informal opinion-formation that preceded Obama's attempts to translate, for instance, gun control into formal political will-formation. The agonists on the other hand, are less well-equipped to analyze the affirmative claims being made by Obama; as is exemplified in Rancière's relegation of laws and regulations to the "police" order rather than the practice of politics, the agonists and radicals tend to have a lot to say about the episodic and "fugitive" nature of democracy, but little to say about how the more quotidian

dimensions of politics should be adjudicated. In short, in their attentiveness to the political, they neglect the police.

3: Compromise and dissent as a third alternative

What is necessary is a model of democracy that includes both a criterion of normative legitimacy *and* a robust incorporation of dissent. This is my aim in constructing compromise and dissent.

The most important feature of compromise and dissent is what I refer to as the “next affected” or (N) principle, which is stated as follows: Only those rules can claim to be valid that meet (or could meet) with the approval of the next affected in their capacity as participants in a practical discourse. This is an adaptation, of course, of Habermas’s familiar discourse (D) principle offered in “Discourse Ethics.”¹³ However, introducing the *next* affected into the equation radically changes the rule’s complexion. Most notably, the concept of ideal theory disappears from deliberative democracy: because there is no way to judge complete or final legitimacy when it depends on the inclusion of the next affected, there is no perfect distillation of democratic justification against which we can judge actual political decisions.

The (N) principle is designed precisely to respond to the types of deep dissent that were exemplified by Occupy Wall Street and Edward Snowden. These two scenes fit into the compromise and dissent framework precisely because they called into question the legitimacy of ostensibly deliberatively justified law, and both generated a responsibility on the part of officeholders and the public to engage in a new process of political opinion- and will-formation. Under the (N) principle, both the status quo they were critiquing and the new discourses that ought to have emerged from them must be envisioned as provisional compromises: as with

¹³ Jürgen Habermas, “Discourse Ethics: Notes on a Program of Philosophical Justification,” in *Moral Consciousness and Communicative Action*, trans. Christian Lenhardt and Shierry Weber Nicholsen (Cambridge, Mass.: The MIT Press, 1990): p. 66.

traditional negotiated compromises between intransigent parties, their content will change with changing circumstances. (N) provides a blueprint for determining *how* they should change—in a way that is maximally inclusive of future dissenters.

The Snowden case is particularly illustrative of deep dissent and the (N) principle in action. As I alluded to above, Snowden's act was an expression of deep dissent. His objection was not only to the particular programs he disclosed to the public (which specifically targeted information known as “metadata,” meaning the locations, parties, and contact information involved in electronic communication without the substance of the communication itself), but to the larger national security state and culture of secrecy that surrounded it. The lack of public deliberation over the particulars of the program were central to his stated motivation: “The more you're told its not a problem until [sic] eventually you realize that these things need to be determined by the public and not by somebody who was simply hired by the government.”¹⁴ While the particular abuses were the proximate motivation for his leak, more deeply he was questioning the very idea of secrecy that lies at the heart of the American national security state—especially since September 11, 2001.

Setting aside the emotionalism that existed in the immediate wake of the attacks on the World Trade Center and Pentagon (a situation that was likely to inhibit discursive political opinion- and will-formation), the intelligence apparatus that was built in the early years of the Bush Administration was ostensibly deliberately justified. The specific pieces of legislation that authorized the sort of wiretapping to which Snowden objected were, in fact, passed by large majorities: even as late as 2007, the Protect America Act (which specifically weakened warrant requirements for electronic surveillance) was approved by the House of Representatives by a vote of 227-183 and by the Senate by a vote of 60-28—both chambers then controlled by the

¹⁴ Rodriguez, “Edward Snowden Interview Transcript.”

opposition Democratic Party.¹⁵ Snowden's revelations, however, indicate that however successfully the advocates of warrantless wiretapping persuaded the public sphere at the time, those measures failed to meet with the approval of the *next* affected—Snowden himself, a generation of younger citizens who were deeply skeptical of the police powers claimed by the U.S. government after 9/11, and a broader public that was unaware of precisely how far the state's surveillance program had gone.¹⁶ Under (N), not only is the legitimacy of the American surveillance state *no longer* legitimate, but it was never legitimate in the first place: the only way to judge its legitimacy was through the ongoing discursive process that was inclusive of future deliberators, not only those who engaged in opinion- and will-formation at the time that it was deliberatively justified. Under this standard, the American political system is undergoing a much more serious test of its legitimacy than it is under the older communicative paradigm: what is demanded is not simply small correction to a program whose legitimacy has been compromised by changing circumstances, but an acknowledgement that it was never fully legitimated in the first place. At best, the initial decision to approve of warrantless wiretapping was a provisional compromise pending the approval of the next affected. With more people rejecting the authority that the NSA has claimed for itself, it is failing that trial.

Occupy Wall Street was, like Snowden's leak, a moment of deep dissent. As I mentioned above, one of the chief complaints that was leveled at the Occupy movement in general was its lack of an explicit set of demands; to public officials and much of the media, it seemed incoherent to form a group that was not organized around a specific set of policy goals, but rather

¹⁵ S. 1927 (110th): Protect America Act of 2007, *GovTrack* <<https://www.govtrack.us/congress/bills/110/s1927>>.

¹⁶ According to a Pew Research Center poll in 2013, people under the age of 30 were disproportionately likely to be more concerned about the privacy implications of state surveillance than they were about the threat of terrorism that it was ostensibly designed to prevent. The poll also found that a majority of the general population disapproves of the NSA's warrantless wiretapping program. "Few See Adequate Limits on NSA Surveillance Program," *Pew Research Center for the People and the Press*, July 26, 2013 <<http://www.people-press.org/2013/07/26/few-see-adequate-limits-on-nsa-surveillance-program>>.

around a generalized rejection of extreme inequality and the financial system that perpetuated it. This characteristic of Occupy was, however, also precisely what made it a more substantial example of *deep* dissent: its members were not simply arguing that the Dodd-Frank financial regulation legislation should have been stronger (though this was probably implicit in their critiques of financial capitalism), but also claiming that the larger political and economic systems were deeply undemocratic and morally suspect. As a response, they did not lobby members of Congress to introduce new financial regulation legislation, but erected a parallel system of governance, education, and economic distribution physically adjacent to the heart of world finance. Soon, Occupy's rejection of class inequality evolved into a larger rejection of the self understanding of the United States: not only did they indict classism, but also white supremacy, patriarchy, and heteronormativity—underscored by their use of the “progressive stack” technique during general assemblies, ensuring that people from a range of oppressed communities were assured the opportunity to speak.¹⁷

Also similar to the Snowden case, proponents of financial deregulation and less progressive tax structures could argue that both had passed a democratic (and even deliberative) test: between the 1970s and 1990s, a strong consensus emerged among policymakers in both the United States and Western Europe that a more lightly regulated financial sector and lower taxes for corporations and the wealthy would be more productive and efficient than what was the status quo at the time. In the U.S., this process culminated with the passage of the Financial Services Modernization Act of 1999, better known as Gramm-Leach-Bliley (GLB), which allowed the consolidation of investment banks, commercial banks, and insurance companies. As in the case of surveillance during the “War on Terror,” advocates for financial deregulation were

¹⁷ Sarah Seltzer, “Where are the Women at Occupy Wall Street?—Everywhere, and They’re Not Going Away,” *The Nation*, October 26, 2011 <<http://www.thenation.com/article/164197/where-are-women-occupy-wall-street-everywhere-and-theyre-not-going-away>>.

not confined to either of the major parties; GLB, for instance, was sponsored by Texas Republican Senator Phil Gramm and signed into law by Bill Clinton.¹⁸ The two institutional proxies for the American people in processes of political will-formation had reached a consensus, and we are still living with the product of that consensus today.

With Occupy and the mounting rejection of extreme inequality in the United States, however, the agreement that developed in what one author has called the “age of greed” has lost the provisional legitimacy it once enjoyed.¹⁹ Under the (N) principle, the legitimacy of any democratic decision is always deferred into the future, meaning financial deregulation and supply-side economics are facing a test of democratic legitimation now. With the deep dissent embodied in the Occupy movement and a growing awareness of extreme inequality by the wider public sphere, it is failing that trial.

At the same time as it more satisfactorily explains the Snowden and Occupy cases, by retaining a normative account of legitimacy in the (N) principle, compromise and dissent can also encompass the claims of affirmative legitimacy made by Barack Obama in his second inaugural address. Like traditional deliberative democrats, those claims can be judged according to the extent to which they have been substantiated by an inclusive process of opinion-formation in the democratic public sphere. But the legitimacy of Obama’s programs are subject to the same future-oriented test as the national security state or the deregulated financial system: even if there were a rationally motivated consensus in support of Obama’s policy proposals, final justification of his programs is necessarily deferred pending the inclusion of the next affected—and arguably, the next affected has already dissented in the form of Edward Snowden. Obama’s claims to be a

¹⁸ David Leonhardt, “Washington’s Invisible Hand,” *The New York Times Magazine*, September 26, 2008 <http://www.nytimes.com/2008/09/28/magazine/28wwln-reconsider.html?_r=0>.

¹⁹ Jeff Madrick, *The Age of Greed: The Triumph of Finance and the Decline of America, 1970 to the Present* (New York: Vintage, 2011).

representative of the voice of the American people are being tested now. While he has offered some reforms to the domestic spying programs as a response to public pressure, the full legitimacy of his representative claims are yet to be judged.²⁰

4: The (N) principle in action

I wrote above that the decisions to allow warrantless wiretapping and implement financial deregulation are failing their tests of legitimacy. Now that they have been dissented to by the next affected, though, the (N) principle requires that they be subject to a political discourse that produces a new compromise. In this final section, I will offer a preliminary sketch of how legitimate compromises on these issues may be reached, with a fuller explanation of the model to come in later chapters. I will focus in particular on the case of warrantless wiretapping, but it should be noted that the structure of legitimate compromises is more general: as a basic rule, actual pieces of legislation should be designed in a way that recognizes their own provisionality. There must be space for the next affected to become involved in the discursive process of legitimation, particularly when they level an objection that represents deep dissent.

How would a legitimate compromise on surveillance be structured today? Since the particulars of any law or policy must be legitimate in actual (future-oriented) practical discourses, it is not possible to comprehensively explain the ideal surveillance legislation in this dissertation. It is possible, however, to examine some of the features that would be basic procedural requirements of a legitimate compromise. First, the administrative secrecy that is permitted by surveillance legislation must be challengeable. From a purely presentist perspective, it may be coherent to legitimately give the NSA free reign in determining which

²⁰ Charlie Savage, "Obama to Call for End to N.S.A.'s Bulk Data Collection," *The New York Times*, March 24, 2014 < <http://www.nytimes.com/2014/03/25/us/obama-to-seek-nsa-curb-on-call-data.html>>.

secrets it keeps and which ones it discloses; this could be understood as an act of delegation, where the parties to opinion- and will-formation acknowledge (1) that it is possible they will be the targets of surveillance, (2) that they accept that possibility as the cost of physical security, and (3) that they believe the NSA is the best organization for making decisions on the level of secrecy that is necessary. This calculation does not work, however, when it is being made for the next affected. In order to judge the acceptability of a surveillance program, they must be able to determine how they are actually being affected, as they did not have the choice to waive that right in the first place. However it is ultimately managed (a more robust appellate process in the Foreign Intelligence Surveillance Court system is one possible avenue), (N) requires that future dissenters have an opportunity to engage in informed deliberation about how secrecy affects them.

Second, and more generally, the (N) principle militates against passing *any* law that lacks a “sunset clause,” requiring that the law must be renewed with an additional round of negotiation at a future date. Most typically, sunset clauses are used as a sort of budgetary gimmick to disguise the long-term cost of government programs. The large tax cuts passed during the Bush Administration, for instance, originally were slated to lapse in 2010, despite the fact that their proponents hoped they would be permanent; as a result, Bush and his Congressional allies were able to downplay the overall effect that they would have on the national debt. Sunset clauses under (N), obviously, would have a different purpose. Empirically, policies passed by legislative bodies tend to have a great deal of inertia; barring crises, there is often not impetus to review their efficacy or democratic legitimacy at a future time. By including expiration dates, however, new discourses can be mandated in the structure of the law itself. This is particularly important with legislation such as the PATRIOT or Protect America acts: they granted the state a great deal

of additional power at a time of perceived vulnerability, but the circumstances (and the ideas and interests of citizens of the United States) have changed in the interim. The panic-driven discourses of the 2000s are not legitimate *unless* they could have the same result in more sober times. A sunset clause in either piece of legislation could have made (and can now make) that new deliberation a legal necessity.

Third, sunset clauses should be designed in a way that makes reapproval of laws more than a mere formality—and specifically that makes involvement by next affected outsiders an integral component of the process. In Habermasian terms, as a general rule deep dissent operates at the level of informal opinion-formation rather than formal political will-formation. The objections of the next affected will not typically be articulated within the halls of a congress or parliament, but in the wider public spheres. The parties to the compromise that are most important, then, are not only legislators whose ideologies, constituencies, and partisan commitments differ among themselves, but also the mass movements, communities, and individuals who mobilize against a law (or, more broadly, a form of life or self understanding) from the outside. When a sunset clause kicks in, there must be a bridge between opinion- and will-formation in order for a compromise to get off the ground. This may be accomplished in a variety of ways, whether it is organized around a formalized version of Bruce Ackerman and James Fishkin’s “deliberation day” (in which national holidays are declared for citizens and public officials to gather in a public space and deliberate), citizens’ commissions that are granted formal roles in the development of policy (a sort of less rigid version of the neocorporatist model practiced in Scandinavia and other Northern European countries), or something else entirely (it must be the product, after all, of actual discourses).²¹ The basic idea is that political will-

²¹ Bruce Ackerman and James Fishkin, “Deliberation Day,” *Journal of Political Philosophy* 10 (2002): pp. 129-152.

formation should be subject to the disruptive power of deep dissent rather than being insulated from it. In the surveillance case, this may be tricky, of course. Assuming that *some* level of secrecy will always be present in the modern, complex administrative state, how can outsiders be integrated into the process? This might be accomplished by giving clearance to outside privacy advocates to be present in some closed committee meetings in which classified programs are discussed. A less radical possibility may be to require that intelligence committee members explain explicitly how the programs they approve meet with standards agreed to by formal transparency advocacy organizations. Clearly, a compromise of some sort must be reached between the critical interests of the next affected and the legitimate national security interests of the state. Regardless, the system as it exists in the status quo errs toward the latter.

As I will explain in more detail in chapter 2, compromises by their nature extend into the future. In order to be legitimate, that futurity must be recognized and integrated into democratic decisions in the right way, namely through the application of the (N) principle. While (N) will never provide a foolproof blueprint for legitimate compromises (and for reasons I have explained, that shouldn't be its goal in the first place), it does provide the contours for how actual participants in democratic discourse should structure those decisions.

* * *

The rest of this dissertation will be divided into five chapters. In the first chapter, I will discuss deep dissent, with particular focus on the meaning of “self understanding,” which forms the basis of the concept. Deep dissent, I argue, is not only a difference between parties' self-understandings of the democratic order, but also a directional one: to *dissent* means to disagree from a position of relative powerlessness. In the second chapter, I will lay out the concept of compromise that informs the rest of the project. Here, I introduce the (N) principle in more

detail, explain how it relates to compromise, and sketch out some of its consequences for democratic theory and practice. In the third and fourth chapters, I more explicitly position compromise and dissent relative to the deliberative and agonistic/radical democratic paradigms discussed briefly above. At the most basic level, I understand compromise and dissent to be a third alternative between those two research programs, and in those chapters I will explain where it overlaps and where it parts ways with them. In the fifth and final chapter, I will use Brazil's recent history, and particularly its passage of the *Bolsa Familia* program, as an example of compromise and dissent in action.

Chapter 1: Deep dissent—a democratic practice

1.1: The nature of deep dissent

“Deep dissent” is the central idea animating my argument. Compromise, I will argue, cannot be taken in isolation; inevitably, the content of political compromises is shot through with the very power relations that structured the discourse that yielded them. As I outline in the introduction, in order for a political compromise to qualify as a *just* compromise, the parties must demonstrate genuine respect for deep dissent by structuring decisions as provisional pending the claims of the next affected. But what do I mean by “deep dissent”? Fundamentally, I understand deep dissent to be *a challenge made by the politically powerless to the self-understanding of the democratic constitutional order*. This requires some explanation, which I will do in this section.

In this chapter, I will explain the concept of deep dissent in detail as a preliminary to my discussion of compromise in Chapter 2. The notion of deep dissent with which I will be working is not entirely new—it is related to the liberal idea of pluralism, the discourse-theoretic idea of self-understanding, the agonist idea of identity\difference, and the Arendtian/Heideggerian idea of world—but I do have a specific concept in mind, and a specific role I believe it plays in democratic practice. Namely, I understand dissent to be the “fuel” of political compromise. When compromises on fundamental issues occur, they must be preceded by the expression of deep dissent. In this section I will unpack that definition, with particular attention to the disputed notion of self understanding.

1.1.1: The challenge

By calling deep dissent a “challenge,” I mean to denote its status as a political practice at the same time as it is a state of affairs. There can be societies or communities that are marked by a great deal of dissent, dissenting is something that people do, and they do it by expressing opposition to something else. I do not consider this to be too far from the use of “dissent” in ordinary language, as captured in the second definition in the *Oxford English Dictionary*: “Disagreement with a proposal or resolution; the opposite of consent.”¹ But the identification of dissent with “a challenge” could apply to run-of-the-mill dissent as well as the stronger sense in which I use “deep dissent.”

1.2: The politically powerless

The distinctiveness of a specifically *deep* dissent begins to come into view with the second concept in my definition: the political powerless. This is meant to convey the idea that deep dissent is directional, and is specifically targeted at a status quo state of affairs that is supported by a group of powerful people and opposed (dissented to) by a group of the powerless, or at least politically weak.

It is true that the formulation “politically powerless” is imprecise, and that there are always gradations of political power. During the civil rights movement in American history, for instance, it could be said that Martin Luther King, Jr., represented a group of political powerless citizens, but at the same time there are clear ways in which King himself was much more politically powerful than the rank and file members of the movement. It is a mistake to categorize “the politically powerful” and the “politically powerless” as monolithic blocs of people.

¹ *Oxford English Dictionary*, “dissent, n.”
<http://www.oed.com/view/Entry/55409?rskey=TV4Ab1&result=1&isAdvanced=false#eid>.

At a basic level, however, I simply intend “politically powerless” to be anyone who has not been included in the decisions that produced a status quo state of affairs. Gay and lesbian people were not consulted when the anti-sodomy laws originally upheld in *Bowers v. Hardwick* were passed. Black people were not consulted when the Jim Crow system was developed in the wake of Reconstruction. And the poor were not consulted when the Newt Gingrich-led Congress passed and Bill Clinton signed “welfare reform” in 1996. As shorthand, powerlessness as I define it is exclusion—whether it takes the form of formal exclusion (like literacy tests and poll taxes) or informal exclusion (such as ignoring arguments that are made in a dialect or accent that does not conform with what the listener associates with persuasive speech).² The status of the politically powerless within deep dissent will become clearer in the next subsection.

1.1.3: Self understanding

“Self understanding” is a rather grand phrase, and its meaning is by no means self-evident. The language of “self-understanding,” for instance, is most closely associated with Habermas, who uses it to describe “ethical” as opposed to “moral” discourses (or, less importantly in this context, pragmatic/empirical or aesthetic ones). While moral validity claims are meant to advance rules or ideas that are universally applicable or binding to all, ethical validity claims concern only what is right for *us*.³ It is in this sense that Habermas refers to them as “therapeutic” discourses: they analyze the specific contexts of a discrete group of people. Moreover, Habermas’s “democratic principle”—introduced in *Between Facts and Norms*—operates at a “different level” than the universalization (u) principle that governs moral validity

² E.g. Iris Marion Young, “Communication and the Other: Beyond Deliberative Democracy,” in *Democracy and Difference: Rethinking the Boundaries of the Political*, ed. Seyla Benhabib (Princeton, N.J.: Princeton University Press, 1996): pp. 120-135.

³ Habermas, *BFN*: pp. 94-99.

claims; legal-political discourses will include moral, ethical, and pragmatic dimensions. The recent debates over the use of unmanned drones on the Afghanistan-Pakistan border, for instance, may include the (pragmatic) question of whether drone strikes are an effective means of combating terrorism, the (ethical) questions of whether their extrajudicial use conforms with *our* constitution or whether they are a smart priority for the defense budget, and the (moral) question of whether the doctrine of double effect can justify the civilians our government routinely kills in our name.

But Habermas's discursive distinctions are, despite their parsimony, deeply problematic. First, they fail to recognize the extent to which ethical and moral discourses are entangled with each other. As Habermas makes clear in "Three Normative Models of Democracy," even if ethical discourses play an important role in democratic politics, they are always separate, and even below, moral ones:

To be sure, discourses aimed at achieving self-understanding—discourses in which the participants want to get a clear understanding of themselves as members of a specific nation, as members of a locale or a state, as inhabitants of a region, etc.; in which they want to determine which traditions they will continue; in which they strive to determine how they will treat each other, and how they will treat minorities and marginal groups; in short, discourses in which they want to get clear about the kind of society they want to live in—such discourses are an important part of politics. But these questions are subordinate to moral questions and connected with pragmatic questions.⁴

In the drone example above, this comes out most clearly in the hypothetical discourse over the drone program's constitutionality. The questions of how we interpret our constitution and a more basic sense of justice owed toward the drone program's victims are not easily disentangled.

Where does, say, the right to due process end and a more fundamental commitment to moral

⁴ Jürgen Habermas, "Three Normative Models of Democracy," *Constellations* 1 (1994): pp. 4-5.

equality begin?⁵ The same is true of the specific examples Habermas offers in the quotation above. The questions of “how they will treat each other, and how they will treat minorities and marginal groups” is not simply distinguishable as a purely ethical question; in fact, it is *both* a question of justice and of the specific structure and rules of one's own society. This sort of question—particularly when it concerns minorities and marginal groups—is precisely related to self understanding: who is included and excluded when we describe ourselves as a nation or a political community, what content is attached to membership in that collective, and, more broadly, how do the collective decisions of a polity bear on our identities as individuals, groups, and citizens of a nation-state?

Second, and perhaps more importantly, Habermas's understanding of self understanding as a continuation of ethical discourses obscures how collective senses of self are richer than a model based on reason-giving at different levels of analysis suggests. In other words, and in specifically Habermasian terms, it fails to recognize the ways in which self understanding—and specifically *shifts* between or *dissent* about self understanding—is not only a “no” that occurs when we pass from communicative action to discourse, but also emerges within ongoing communicative action. As I have argued elsewhere,

The emergence of a “no” constitutes a challenge to some aspect of this lifeworld context. When such a challenge appears, Habermas argues, the actors “step out of” the performative attitude of communicative action into a “hypothetical,” impartial one...

A moment's thought, however, suggests that one does not so quickly and easily distance oneself from the lifeworld context of action, within which one follows the taken-for-granted validity of the normative infrastructure of that context. The process by which one begins to formulate an explicit challenge, a “no,” is likely to

⁵ Habermas has not been completely oblivious to the fluid nature of this question, as indicated by his explicit writings on constitutionalism (e.g. “Constitutional Democracy,” *BFN* Chapter 8, etc.). But, to my knowledge, he has not addressed the way in which “constitutional patriotism” (for instance) as an attachment to universal justice embodied in *our* constitution poses problems for the larger distinction between ethical and moral discourses.

be a long one both in terms of changes in one’s aesthetic—expressive bent—for example, beginning to imagine oneself differently or developing the courage to no longer simply go along—and in the conceptualization of exactly what is at issue. This whole existential terrain has to be understood more in terms like the ones Judith Butler uses: we are thrown into terms of existence we did not choose, and efforts to effectively challenge them are fraught with difficulties.⁶

Self understanding is just such a “thrown” project. When the “ethical” validity claims of a discourse pass beyond disputes over highway funding or post office naming—when the matter at issue is more fundamentally how we understand ourselves as a political community, and the basic rules that govern us—our shift to a discursive “no” is more than discursive; it is also an onto-ethical and experiential shift.⁷ It is in this sense that I understand there to be a distinction between more quotidian dissent to a particular law or policy and *deep* dissent that arises in opposition to a dominant status quo self understanding.

It is for these reasons that I intend to reconfigure self understanding around three ideas: the basic terms under which we wish to live as a democratic community; our understanding of the purpose of the democratic constitutional state; and how and where we draw the boundaries of citizenship. All of these ideas touch on basic questions of political theory, and I believe all also have collectively understood answers that are implicit in our discourses and political decisions. I will explain each of these ideas in turn.

When I say “the basic terms under which we wish to live as a democratic community,” I am referring to something akin to Rawls’s basic structure, which he defined as “the way in which the main political and social institutions of society fit together into one system of social cooperation, and the way they assign basic rights and duties and regulate the division of

⁶ Stephen K. White and Evan Robert Farr, “No-Saying in Habermas,” *Political Theory* 40 (2012): pp. 37-38.

⁷ *Ibid.* p. 38.

advantages that arises from social cooperation over time.”⁸ However, while I believe the idea of the basic structure is a good floor for understanding the political community’s structure, I also believe there is a concomitant ethos or set of norms that operate at the individual or group level as well as the societal or institutional level. For instance, are taxes simply a contractual arrangement that allows us to receive services that we lack the organizational power to secure for ourselves, or are they an investment that we are obligated to pay for the benefit of everyone? Is freedom of speech a formal right that permits all to communicate to the extent that they can afford to purchase media, or does freedom entail a substantive ability to act? These are familiar questions in political theory, of course. It is also true that there is rarely a single, hegemonic answer to them in any democratic community. But I rehearse them here merely to point out that despite their status as “basic” questions, they have a supra-institutional, ideational character. This set of both institutional and ideational structures is a component of self understanding.

The second component of self understanding is our conception of the purpose of the democratic constitutional state. This component in turn has two secondary ideas within it: the purpose of democracy and the purpose of the state. An answer to this question is implicit in most discourses bearing on fundamental political issues; in order for opinion-formation on, say, the 2010 Affordable Care Act in the United States to be feasible, parties to discourse had to have an idea of whether the democratic state was responsible for fostering a materially adequate quality of life or whether democracy merely serves as a justification for minimally coercive institutions. Proponents of the former were more likely to support the ACA (or some other system of guaranteed health insurance), while proponents of the latter, more libertarian understanding were more likely to oppose it. When we answer questions about what the state should do in this

⁸ John Rawls, *Justice as Fairness: A Restatement* (Cambridge, Mass.: Belknap, 2001): p. 10.

instance, we are also making more fundamental claims about the purpose and ends of democracy and of the state. These claims also make up a component of self understanding.

Finally, self understanding is intimately connected to what has sometimes been called democratic theory’s “boundary problem.” When we come together to engage in democratic discourses and make democratic decisions, we are coming together *into* a demos, and the horizon of that demos is always a matter of contention. While I will sidestep the debate over the paradox of the self-constituting demos, the boundaries of citizenship are one of the most basic questions we try to answer when we engage in the practice of democracy, and mapping these discourses will be crucial to understanding the phenomenon of deep dissent.⁹ In American history, many of the most important mass movements have been concerned with this very issue—abolitionism, women’s suffrage, and the civil rights movement all arose in opposition to a hegemonic understanding of who counted as a citizen, both in the formal (the legal right to vote) and substantive (the right and ability to participate as equal parties in the social and political world) senses. It is almost a truism: our notion of who *we* are is a part of self understanding.

1.2: Pluralism, self understanding, and world

In this section I will orient deep dissent relative to several familiar concepts in contemporary political theory. While the Habermasian phrase “self-understanding” forms the core of my definition, it will become clear that I mean something more than the simple distinction between moral and ethical discourses. In order to bring out its richer components, I will situate deep dissent in relation not only to Habermas’s definition of self understanding, but also to pluralism

⁹ Against the very different arguments offered by Bonnie Honig or Frank Michelman, I would make the pragmatic claim with Habermas that we are always already in a political community, making the issue of foundations more of an interesting philosophical problem than a practical impediment to deliberative democracy.

and world. In the second section I will attempt to anticipate and answer some potential criticisms to my understanding of deep dissent.

1.2.1: Deep dissent and pluralism

In some ways, deep dissent is in the same family of ideas as several other terms that have become part of the standard language of political theory in the past couple decades. Like “pluralism,” I mean it to denote the inescapable fact that there are a wide variety of worldviews in any political society. Like “multiculturalism,” I want it to suggest something more than a set of Facebook-style “likes,” a mutable outlook that we can slip on and off as the situation demands; like the disputed notion of “culture,” deep dissent is more deeply implicated with the self than mere opinion.¹⁰ And like identity\difference, I mean deep dissent to signify that the “pathos of distance” is not something as easily managed or circumscribed in democratic society as some theorists have seemed to suggest¹¹; deep dissent creates impediments to communication, reifies power structures, and sows the seeds of unrest—although at the same time anything that is meant to *reduce* deep dissent is difficult (impossible?) to justify in a democracy.

At the same time, however, deep dissent goes beyond the way these issues have generally been treated in the democratic theory literature. The contrast with “reasonable pluralism”—a central concept in Rawlsian deliberative democracy—is particularly pronounced. In “The Idea of Public Reason Revisited,” Rawls lays the ground for voluntary restrictions on public political discourse by arguing that “a basic feature of democracy is the fact of reasonable pluralism—the fact that a plurality of conflicting reasonable comprehensive doctrines, religious, philosophical, and moral, is the normal result of its culture of free institutions,” and that citizens “cannot reach

¹⁰ As for the “multi” in “multicultural,” I’m also similarly suggesting that deep difference is not an insurmountable impediment to political association—although that comes later in this chapter.

¹¹ Here I am referring especially to Rawls’s “overlapping consensus.”

agreement or even approach mutual understanding on the basis of their irreconcilable comprehensive doctrines.”¹² Reasonable pluralism and Rawls’s solution for it—public reason, where parties to political discourse only use arguments that are not sourced in comprehensive doctrines, essentially “laying aside” their own deeper commitments—are categorizations that enable Rawls to at once limit the problematic content of political discourse and the range of matters that politics is meant to address.

Deep dissent goes beyond reasonable pluralism by recognizing real and constitutive differences between “comprehensive doctrines” that also are *inextricably bound up with how we wish to live together*. The object of deep dissent cannot be easily partitioned from “thicker” understandings of the self and the good; in fact, the most fractious political disputes concern those understandings precisely. In the case of the Occupy movement (an example I will return to throughout this dissertation), the protestors in Zuccotti Park had a much larger set of grievances with the status quo than the baseline justice of political and economic institutions in the United States. The protest itself grew out of a call from *Adbusters* magazine, and while that publication cannot claim to “own” the protests any more than anyone else can, the association is telling. Each issue of *Adbusters* is a sort of radical collage, premised on a generalized rejection not only of the sort of financial capitalism practiced on Wall Street but also with a wider malignant form of life that links consumerism, artificiality, and sanitized individualism. As the magazine itself put it recently in an article marking its 25th anniversary, they originally dubbed themselves “The Journal of the Mental Environment” as a way of marking themselves off from the increasing tendency of late modernity to prefer “leaving behind real life in the physical world for a virtual

¹² John Rawls, “The Idea of Public Reason Revisited,” in *Political Liberalism: Expanded Edition* (New York: Columbia University Press, 2005): p. 441.

one.”¹³ The ethos behind both *Adbusters* and Occupy goes beyond a conception of justice that is compatible with multiple comprehensive doctrines—though it would be difficult to categorize that ethos as a comprehensive doctrine in its own right. Occupy, and deep dissent in general, is not so much a rich conception of the good life as it is a strong rejection of the *bad* life. And this rejection cannot be separated from the dissent itself.

Moreover, the form of life exemplified in the Occupy movement was one that extended beyond the Rawlsian understanding of “political” justice. Their aims were not only to make adjustments to the underlying basic structure—and certainly not only to more fully implement observance of the difference principle in American public policy. As Margaret Kohn notes in her article on Occupy Toronto, the participants there viewed their occupation not only as a protest, but also “a place to create a new form of community that practiced the values that inspired the protest”:

Another key idea was that values must be lived before they could be espoused. This is a particularly striking departure from academic ethics and political theory. Theories of deliberative democracy and discourse ethics identify truth and sincerity as underlying preconditions of successful communicative action. Many of the occupiers, however, took the idea of sincerity and placed it at the core of their approach. They insisted that before you preach against inequality and injustice you must practice non-domination in your relationships with others. This practice not only deepens your understanding of your values, but it also transforms the relationship between citizen and state. It positions the citizen as an agent rather than a supplicant who is asking the state to provide some good or service.¹⁴

That “departure from academic ethics and political” theory is most striking as a contrast with Rawls. In his work, what sets apart a “political” conception of justice is not only the absence of comprehensive doctrines, but also the fact that it is a conception of justice that operates only at

¹³ Kalle Lasn, “Our Virtual Horizon,” *Adbusters*, March 7, 2014
<<https://www.adbusters.org/magazine/112/virtual-horizon.html>>.

¹⁴ Margaret Kohn, “Privatization and Protest: Occupy Wall Street, Occupy Toronto, and the Occupation of Public Space in a Democracy,” *Perspectives on Politics* 11 (2013): p. 104.

the state, or at least collective, level—it does not generate individual- or group-level obligations (beyond the general political obligation generated by the principle of fair play). In erecting a parallel commonwealth with a different collective understanding of what it means to be a citizen and to live in a democratic community, the Occupiers were implicitly suggesting that this sort of distinction cannot be made so cleanly; deep dissent cannot be adequately captured within the domesticating confines of public reason.

As I will explain in more detail in the next chapter, the idea that the Occupiers were offering an alternative self-understanding that was intimately bound up with how we live together also affects the type of democratic legitimacy that would be achievable under Occupy-style conditions of deep dissent: the legitimacy of a compromise is not measured according to the extent to which it conforms to a prepackaged conception of substantive justice, but rather according to its future-oriented inclusiveness; not only does this view understand justice as procedural justification rather than an ideal typical end-point, but also suggests that *deep dissent* always interrupts any ongoing process of justification. By limiting public reason and the overlapping consensus to rigidly non-comprehensive doctrines, Rawlsian liberalism cannot fully account for the role of deep dissent in democracy.

Rawlsian “public reason” serves at best to limit the political influence of dissenters, and at worst to calcify the status quo: the rhetoric and interests of the dominant faction are defined as “public,” while the minority—those whose rhetoric and interests are unintelligible to the majority—are defined as hopelessly parochial, unable to translate their desires into the appropriate language. At least the first part of the formulation—“deep”—suggests that what is at issue is more than a thin conception of political justice, Rawls-style. Rather, deep dissent concerns the collective self-understanding of a given political community: not only this or that

law or policy, but also the terms on which the democratic constitutional state is founded and functions in the first place.

Moreover, as the previous paragraph implies, conceptualizing controversy as “dissent” means I necessarily must grapple with the fact of power disparity in any political dispute. The word “dissent” is monodirectional: to dissent is to oppose a decision, or a status quo state of affairs, or a dominant understanding or structure of power. It would have been incoherent to categorize, say, hedge fund managers who opposed the message of Occupy Wall Street as “dissenters,” because Occupy itself was/is an insurgency, a peripheral movement meant to change the political-economic structure of the status quo. To put it more succinctly (though perhaps less precisely), deep dissent always comes from below.

Rather than the well-worn concept of “pluralism,” I understand deep dissent to be more akin to the agonistic notion of “pluralization.”¹⁵ The democratic constitutional state does not consist of a pre-determined set of manageable and tolerable pluralistic units, but rather is a flux of selves and others that are continually defining themselves in relation to each other in novel ways. New identities and self-understandings come into being and overlap with others in unforeseeable ways—and the interests of these shifting self-understandings are even less predictable. Deep dissent, then, is fundamentally as dynamic as it is constitutive and power-laden (and for this reason I will later propose that we reformulate Habermas’s famous “all affected” (u) principle as a “next affected principle”); it is the observable occurrence of what Jacques Rancière calls the “essence of politics”:

The essence of politics is *dissensus*. Dissensus is not a confrontation between interests or opinions. It is the demonstration (*manifestation*) of a gap in the sensible itself. Political demonstration makes visible that which had no reason to be seen; it places one world in another – for instance, the world where the factory is a public space in that where it is considered private, the world where workers

¹⁵ E.g. William E. Connolly, *Ethos of Pluralization* (St. Paul, Minn.: University of Minnesota Press, 1995).

speaking, and speaking about the community, in that where their voices are mere cries expressing pain.¹⁶

Like Rancière, I understand this process—the rending of status quo intelligibility, “a vanishing difference with respect to the distribution of social parts and shares”—to be fundamental to politics. Unlike Rancière, however, I do not believe that the coming-into-being of dissensus is the end of that process. Rather, it has a distinctive place in my conception of democratic legitimacy.

How, then, should deep dissent operate in democratic politics? For the most part, the specific answer to this question will be deferred to the next chapter, where I link up deep dissent and political compromise. But here I will begin to sketch its function by examining Habermas’s understanding of the Arendtian concept of “communicative power”:

Set communicatively aflow, sovereignty makes itself felt in the power of public discourses. Although such power originates in autonomous public spheres, it must take shape in the decisions of democratic institutions of opinion- and will-formation, inasmuch as the responsibility for momentous decisions demands clear institutional accountability. Communicative power is exercised in the manner of a siege.¹⁷

While much of the specific mechanics I will lay out in the next chapter depend on the actions of officeholders—in Habermasian terms, those engaged in political will-formation responding to informal opinion-formation in the public sphere—the *force* of dissent comes from outside the halls of power, and depends on dissenters exercising communicative power against an intransigent legislature and administrative state. Habermas’s striking siege metaphor is particularly appropriate in this context: through demonstrations, civil disobedience, and mobilization of publics and counterpublics, dissenters can leave the politically powerful with a

¹⁶ Jacques Rancière, “Ten Theses on Politics,” in *Dissensus*, ed. and trans. Steven Corcoran (New York: Continuum, 2010): p. 38.

¹⁷ Jürgen Habermas, “Popular Sovereignty as Procedure,” in *Deliberative Democracy: Essays on Reason and Politics*, ed. James Bohman and William Rehg (Cambridge, Mass.: The MIT Press, 1997): p. 59.

choice between relenting and “starving.” Deep dissent, when exercised effectively, brings a new world into conflict with the dominant *Lebensform* of the status quo—a world that had previously remained implicit or unrecognized.

1.2.2: Deep dissent and world

This last reference to “world” and “worlds” links up the spare concept of pluralism to a richer understanding of subjectivity. While the use of “world” as a description of the way individuals are linked to each other, to place, and to historical memory is often associated with Heidegger and later with Arendt, I mean to operationalize the more explicitly political use of the term by Rancière. When I qualify compromise as *political* compromise (as opposed to legislative compromise, or democratic compromise, or any of the other phrasings you often encounter in the literature), I mean something close to Rancière’s definition of “politics” as distinguished from “police”: police is “the set of procedures whereby the aggregation and consent of collectivities is achieved, the organization of powers, the distribution of places and roles, and the system for legitimizing this distribution,” while “political activity is whatever shifts a body from the place assigned to it or changes a place’s destination,” or that which “makes understood as discourse what was once only heard for noise.”¹⁸

In Rancière’s understanding, dissent (unsurprisingly) is political activity par excellence.

There can be no politics without disputes over self understanding:

Politics does not exist because men, through the privilege of speech, place their interests in common. Politics exists because those who have no right to be counted as speaking beings make themselves of some account, setting up a community by the fact of placing in common a wrong that is nothing more than this confrontation, the contradiction of two worlds in a single world: the world where they are and the world where they are not, the world where there is

¹⁸ Jacques Rancière, *Dis-Agreement: Politics and Philosophy*, trans. Julie Rose (Minneapolis: University of Minnesota Press, 1999): pp. 28, 30.

something “between” them and those who do not acknowledge them as speaking beings who count and the world where there is nothing.¹⁹

The role and responsibility of dissenters, then, is to bring into being a world—to expand the boundaries of the politically intelligible, to paraphrase Judith Butler.²⁰ In this passage, Rancière is specifically referring to plebeians asserting themselves as “speaking beings” vis-à-vis patricians in Ancient Rome, and Butler’s references to “intelligibility” are similarly in the context of identity politics—most prominently the assertion of non-hetero and transgender persons as legitimate speakers and their claims as legitimate political claims. But whether deep dissenters are explicitly pressing an “identity” claim or not, it still functions as an assertion of a new form of subjectivity: they voice opposition to a “form of life.”

Writing in the context of the West German anti-nuclear protests in the early 1980s, for instance, Habermas recognized the sense in which activists’ dissent was “rooted in the rejection of a form of life—namely, that form of life which has been stylized as the normal prototype—which is tailored to the needs of a capitalist modernization process, programmed for possessive individualism, for values of material security, and for the strivings of competition and production, and which rests on the repression of both fear and the experience of death.”²¹ Deep dissent emerges not only in what is traditionally understood as “identity politics,” but also in any act of political opposition that articulates an alternative framework for self understanding that stands in opposition to the status quo—where a form of life is rejected, a new world comes into being. The path that the polity will take in response to this is never predictable, and this is where

¹⁹ Ibid.: p. 27.

²⁰ Judith Butler, *Gender Trouble: Feminism and the Subversion of Identity*, 10th Anniversary Edition (New York: Routledge, 1999): p. 39

²¹ Jürgen Habermas, “Civil Disobedience: Litmus Test for the Democratic Constitutional State,” trans. and intro. John Torpey, *Berkeley Journal of Sociology* 30 (1985) : p. 110. Translation slightly altered.

political compromise becomes a crucial political imperative, but the compromise can only come after the act of dissent.

By introducing deep dissent into deliberative democratic theory (partially by following to its logical conclusion some of the things Habermas himself has written) I intend to retain a framework for at least *imperfect* legitimacy in democratic theory while also leaving space for the idea that central to any strong conception of democracy—when it is understood as something more than a set of institutions and procedures, or as a neoliberal checklist—is a sense of natality: to act democratically is to bring the new into being, and the new can never be fully contained within a stable political order. The interaction of deep dissent and political compromise, if I am successful, will make good on Sheldon Wolin’s understanding of democracy as “rational disorganization”: political life should create ruptures, but those ruptures should be—to the greatest extent possible—oriented toward an understanding of political justice, however incomplete and imperfect.²²

1.3: Does deep dissent inhibit legitimacy?

At this point, problems—both theoretical and practical—arise. On the theoretical side, it is potentially incongruous for me to simultaneously endorse a strong conception of dissent and an understanding of democratic legitimacy sourced in political compromise. The type of dissent under discussion is, after all, closely associated with radical contingency and pluralization; as all of the authors discussed above point out, the combination of legitimacy—based as it is in political stability and progress—and dissent—which is premised on a sort of radical fluidity—strikes a dissonant chord. On the practical side, dissent seems intuitively to be more effective as a

²² Sheldon Wolin, “Norm and Form: The Constitutionalizing of Democracy,” in *Athenian Political Thought and the Reconstruction of American Democracy*, ed. J. Peter Euben, Josiah Ober, and John R. Wallach (Ithaca, NY: Cornell University Press, 1994): p. 32

block than as a catalyst to the collective action inherent to political compromise. In the remainder of this chapter, I will flesh out this potential inconsistency between contingency and legitimacy, and then conclude with the beginnings of a framework that can square the circle of compromise and dissent.

3.1: Dissent and linearity

When we take dissent seriously, we are forced to acknowledge that nothing is automatic in the field of political rights. While the idea that political progress is not inevitable may seem uncontroversial, the strong sense in which agonists like William E. Connolly or Bonnie Honig mean it is anything but.

Most accounts of political legitimacy in the deliberative democratic tradition begin with an account of an ideal—or at least practicably fair—political process. For Rawls, this was originally the wholly hypothetical original position behind the veil of ignorance, and later the somewhat less hypothetical overlapping consensus through public reason. For Habermas, it was first the widely detested ideal speech situation, and then the less fanciful popular sovereignty following a process of deliberation subject to the principles of discourse and democracy. The path to political legitimacy is ultimately both procedural and substantive; the process is what democratic theorists typically emphasize, but the end of greater political justice, equality, and rights is more than just a strong subtext; without it, democracy is much more difficult to defend. Thus, Rawls argues that his principles of justice can be freely endorsed by a people if they would simply discuss issues free from their own parochial biases. And thus Habermas insists that human rights and popular sovereignty are co-original, and that democratically engaged citizens

will secure greater rights for future generations through their “tappings” of the original message of the constitution.

To the agonists, this all sounds like Whig history. Even if Habermas abandons the older, Kantian story of providential progress, he cannot shake it completely, says Honig:

The future to which he looks is not Arendt’s post-providentially contingent and open-ended future. Instead, it is a teleological process in which the co-originality of law and democracy emerges at last in and out of time, understood “as a self-correcting learning process.” Nietzsche’s warning comes to mind here: the fact that we have killed god does not mean we have stopped living in his old houses.²³

Habermas’s strictly procedural story has to smuggle in a strong substantive component and an equally strong teleology in order to retain its appeal. And this is a problem for deliberative theories of democratic legitimacy in general: deliberative justification only works, critics charge, if it can somehow be guaranteed that the democratic process itself won’t go off the rails, and this guarantee is always a fiction. Rather than strive for legitimacy, Honig argues that we should recognize and account for the fact that “the stories of politics have no ending, they are never-ending.”²⁴

Given the fact that I broadly accept the terms of deliberative democratic theory—the source of legitimacy is still ultimately their justification in practical discourses—the same accusation could be applied to me. Critics may charge that I am trying to have it both ways: celebrating the fluidity and unpredictability of dissent, while at the same time attempting to tame it and constrain it for predetermined ends of stable, substantively justifiable democratic results. While there is probably no way to completely quell this suspicion, I believe it loses sight of an important component of my argument. As will become clearer in the next chapter, I intend this to

²³ Bonnie Honig, “Dead Rights, Live Futures: A Reply to Habermas’s ‘Constitutional Democracy’” *Political Theory* 29 (2001): p. 796.

²⁴ Bonnie Honig, *Emergency Politics: Paradox, Law, Democracy* (Princeton, N.J.: Princeton University Press, 2009): p. 3.

be a theory of *imperfect* democratic legitimacy. Compromise and dissent can never serve the same strong justificatory role as the idealized form of Habermas’s discourse theory of law and democracy, because they are always premised on ongoing disagreement, and future disagreements that can never be fully accounted for. I eschew full deliberative legitimation and consensus even as idealizations; legitimacy is always partial and occurs in fits and starts. Even within the bounds of my preferred procedure, there is no guarantee that the results of democratic deliberations will be perfect—and in fact, democracy *depends* on a conception of futurity that is open-ended, with new sources of dissent emerging as challengers to the new status quo. As for substantive ends, we can do no more than pin our hopes on the possibility of meliorism, and recognize that meliorism is impossible without a fluid orientation to the future.

3.2: Deep dissent and gridlock

The practical problem with deep dissent—and the problem it specifically poses for the prospects of political compromise—is very straightforward: dissent, and deep dissent in particular, makes it more difficult to “get things done.” This type of rhetoric, which poses dissent and compromise as irreconcilable conceptual opponents, is prevalent not only in the democratic theory literature, but also in contemporary political rhetoric and the mass media. Jane Mansbridge, in her 2011 Madison Lecture, urged democratic theorists to move away from a mode of scholarship that valorizes resistance for precisely this reason: “In the tension between resistance and action, context is critical. Tyrannical regimes demand resistance. Deeply corrupt regimes cannot justly claim legitimacy. But when the threat of tyranny is relatively weak and corruption relatively limited, the need for collective action is often greater than the need for resistance.” For this reason, she urges “a shift in emphasis within democratic theory, from a long-standing promotion

of resistance to the greater embrace of coercion, even while recognizing that the coercion can never be more than partially legitimate.”²⁵ As the title of her lecture, “On the Importance of Getting Things Done,” suggests, the bottom line is that sometimes legitimate dissent should be bypassed (though not ignored) in the name of avoiding perpetual stagnation.

Similar rhetoric abounds in our current public sphere. In the various budget skirmishes Barack Obama has engaged in with Congressional Republicans, the call from “both sides” has frequently been to “roll up our sleeves” and “get to work.” The worst political barbs being flung at the President and the GOP is that each is intransigent, bent on sticking with rigid principles instead of searching for common ground.²⁶ In this rhetorical style, dissent is precisely what *gets in the way* of compromise. If only everyone would back off on their demands, we could finally get out of some ill-defined “mess” we’ve found ourselves in.

These problems cannot be completely brushed under the rug. Dissent *can* be an impediment to compromise, and by definition it occurs in opposition to something else. There is nothing to guarantee that dissent will articulate a full-formed or achievable alternative at the same time as a “no.” And when dissent is widespread, it is difficult to “get much done” without coercing the dissenters, whether this is done in the name of democratic legitimacy or in the name of authority for authority’s sake. However, while deep dissent is difficult to accommodate fully, it is also fundamentally necessary if the compromises we reach are to be legitimate. Without it, our public sphere is a barren place and our public discourse is an empty exercise. If communicative power is exercised in the manner of a siege, there can be no communicative

²⁵ Jane Mansbridge, “On the Importance of Getting Things Done,” *PS*, January 2012: p. 5.

²⁶ E.g. Sean Benen, “Those who still blame Obama for GOP intransigence,” *The Maddow Blog*, March 4, 2013 (<http://maddowblog.msnbc.com/news/2013/03/04/17183378-those-who-still-blame-obama-for-gop-intransigence?lite>); Jennifer Rubin, “Media turn on Obama, intransigence out of favor,” *The Washington Post*, November 28, 2012 (http://www.washingtonpost.com/blogs/right-turn/post/media-turn-on-obama-intransigence-out-of-favor/2012/11/28/a2956726-3972-11e2-8a97-363b0f9a0ab3_blog.html).

power on the most basic political issues without deep dissent. In the next chapter, I will lay out the specific mechanics of deep dissent as it relates to political compromise. While compromise and dissent may never be perfectly congruous, they can also never be understood in isolation from each other.

Chapter 2: Unlikely bedfellows: dissent and compromise

I see political compromise as a “third way” between traditional deliberative democracy and agonistic or radical democratic theory. Conceived in the way I will lay out below, I believe compromise can capture the affirmative orientation of deliberation along with the radical potential of agonism. This may seem odd at first blush. “Compromise” is rarely a practice that is sanctified for its own sake, either in ordinary language or the theoretical literature. In ordinary language, compromise tends to be thought of in one of two ways: either as a necessary evil that is justified purely on pragmatic grounds, or as the province of scoundrels. This can be seen particularly clearly in the negative adjectival form of the word. “Uncompromising” is typically used to describe either an obdurate extremist who spoils would-be agreements *or* the “man/woman of principle,” those political figures (or occasionally artists, athletes, and businesspeople) who will not allow small-minded opponents to get in the way of what is right. While compromise’s reputation swings in both directions, however, I believe that the latter, negative interpretation is dominant. Just think of every spy movie you have ever seen: the news that “Agent 114 has been compromised” is never a good thing!

Things are not much different in the democratic theory literature. When Habermas considers compromise, he typically groups it together with bargaining, which is a separate practice from either communicative action or discourse. As opposed to practical discourses that can render consensus, bargaining turns on the *particular* interests of the parties to the bargaining procedure. Even if it is a component of political will-formation, for Habermas bargaining bears a family resemblance to the types of procedures that occur between contractual partners involved in a mediated dispute; in the same way that Party A and Party B can strike a balance about, say,

where the line between their respective properties is drawn on a plat, the progressiveness of the tax code can be decided in a way that balances the interests between competing parties. The only caveat is that this procedure is fair, while the stronger requirements of the discourse principle apply only indirectly:

Whereas rationally motivated consensus (*Einverständnis*) rests on reasons that convince all the parties *in the same way*, a compromise can be accepted by the different parties each for its own *different* reasons... The discourse principle, which is supposed to secure an uncoerced consensus, can thus be brought to bear only indirectly, namely, through procedures that *regulate* bargaining from the standpoint of fairness.¹

Anglo-American liberals, according to Richard Bellamy (himself a liberal defender of compromise), typically take the anti-compromise view: “to adopt a ‘compromising position’ is the mark of politicians motivated by pure self-interest and ready to do any deal for the sake of furthering their careers or holding on to power. To compromise is to compromise oneself.”²

I will argue that these understandings are misguided. My interpretation of compromise turns on a simple proposition: *the essence of compromise is deferral*. When we enter into compromises, particularly under conditions of deep dissent, we are always holding out for something better: something more satisfying for our own interests, a more equitable balance, or a greater understanding of what is at stake. Similar to agonism, a compromise entails recognition that there is no grand, final consensus that can be reached, at least not in the status quo. Similar to deliberation, it aims at a reasonable agreement, even if it is not one that is rooted in consensus.

But what is compromise “at its best”? Keeping in mind my identification of compromise with deferral, I will introduce a criterion for adjudicating the relative legitimacy of compromises by adapting Habermas’s familiar “all affected” (u) principle into what I call the “next affected

¹ Jürgen Habermas, *Between Facts and Norms: Contributions to a Discourse Theory of Law and Democracy*, trans. William Rehg (Cambridge, Mass.: The MIT Press, 1996): p. 166.

² Richard Bellamy, *Liberalism and Pluralism: Towards a Politics of Compromise* (London: Routledge, 1999): p. 94.

principle.” But first, I will answer two more basic questions: what is compromise, and why do I place it at the center of my understanding of democratic legitimacy?

2.1: The nature of compromise

2.1.1: What is compromise?

What does it mean to say that the essence of compromise is deferral? At first blush, this may seem to be a strange thing to say. In ordinary language, it might be said, compromise is not intrinsically related to deferral. Rather, it simply refers to an agreement of mutual sacrifice between parties with conflicting interests or desires. In this understanding, compromise has no inherently temporal dimension, but is simply a decision procedure for settling when no individual or group has enough power or (in the specifically democratic setting) political support to fully achieve its aims.

It is on this last point, however, that I believe the deep structure of compromise is entangled with temporality and, more specifically, provisionality. If compromises always occur when no party has the resources to achieve all of its aims in a negotiation or deliberative setting, then those parties are more likely to view the settlements that are reached to be mere *modus vivendis* than ultimate conclusions. Even if the specific content of a compromise is not up for appeal in the future—you cannot, for instance, unfight a war or unbuild a bridge—the broader orientation that resulted in an irreversible policy always is. So even if a party agreed to, say, allow harvesting on fifty percent of a public forest while the other half was devoted to conservation, the decision could be seen to have been oriented toward the future despite the irreversibility of damaging half the forest ecosystem; the party fighting for conservation would

presumably save more of the forest in the future if they were to gain the ability to have their way without making concessions.

Both in ordinary language and political practice, compromise is a deferral to the future, with the future ideally holding out the possibility of real political victory. Of course, this is hardly the stuff of ideal theory. There is nothing noble or just in the idea that the most powerful generally get what they want, and that politics (and by extension political compromise) is simply a struggle to gain enough power to achieve particularistic ends. In the remainder of this chapter, I aim to sketch a model of democratic legitimacy that survives this reality of power politics and perpetual conflict. Keeping in mind my discussion of “deep dissent” in the last chapter, that model begins with the relation between compromise and dissent.

2.1.2: Why compromise? The relation between compromise and dissent

The first relation between compromise and dissent comes through the moral and practical pressure that dissent exerts on the politically powerful. This idea is based on Habermas’s democratic principle, which “states that only those statutes may claim legitimacy that meet with the assent (*Zustimmung*) of all citizens in a discursive process of legislation that in turn has been legally constituted.”³ While Habermas stated the principle in a way that drew a technical connection between democracy and his earlier theory of communicative action, the idea is actually a fairly straightforward assumption of democracy in general: even if citizens disagree with the substance of particular rules, the process that creates them must be one that is both inclusive and procedurally legitimate. However, while the democratic principle—based on the idea that all affected parties should have a say in political discourse—is an important foundation,

³ Jürgen Habermas, *Between Facts and Norms: Contributions to a Discourse Theory of Law and Democracy*, trans. William Rehg (Cambridge, Mass.: The MIT Press, 1996): p. 110.

it is at the same time inappropriately static. When new sources of deep dissent emerge, it is ill-equipped to integrate them into the democratic framework, and this emergent exclusion creates a crisis of legitimacy for the democratic process. Because politics has to be understood dynamically, I propose that we redirect the familiar “all affected” principle to the “next affected” (N) principle, stated as follows: “Only those rules can claim to be valid that meet (or could meet) with the approval of the next affected in their capacity as participants in a practical discourse.” This dynamism is why no political decision in a democratic society should be understood as permanent; because new forms of dissent and identity continually and unpredictably crop up, final political or constitutional closure should always be deferred into the future. I will explain the (N) principle in more detail in the next section.

The second relation between dissent and compromise, in a sense, goes in the other direction. If the previous paragraph can be summarized as “dissent demands compromise,” this relation can be summarized as “(legitimate) compromise needs dissent.” This is the case because democratic deliberation occurs within a sort of “feedback loop”: political decisions are trapped in a closed circle, and the most important ones—what I’ll call “constitutional crises”—are trapped in closed circles at two different levels. This story goes as follows: All discursive processes of legitimation—or in less technical terms, all democratic political decision-making processes—begin with a set of parties coming together to deliberate or debate a problem. After a decision is reached, it is subject to evaluation and possible changes in the future. It is at this stage, however, that the problem emerges: Ultimately these evaluations or changes are thrown back to the same parties who deliberated and reached a decision in the first place (in large-scale democracies, of course, the most influential parties are elected representatives in parliament or congress). This results in a sort of closed circle. In cases of constitutional crises, where the problem at issue

bears fundamentally on the polity's basic functioning and self-understanding, the closed circle exists at yet another level. In this instance, the problem begins with the status quo application of the constitution. When this application encounters a problem of interpretation, the solution to the problem that always precedes any process of legitimation involves *looking to the constitution itself*, not only for the substance of the new interpretation but for the process of interpretation as well. This expands on a problem recognized by Habermas: "Needless to say, the constitution itself decides what the procedure should be in the case of conflicts over the correct interpretation of the constitution," but civil disobedience can "side-step" the problem the self-interpreting constitution.⁴ In this chapter, I take this observation and apply it more broadly than Habermas: not only does civil disobedience (and engagement with dissenters in general) break the *constitution's* "self-referentiality," but also that of the political system in general. Without it, compromise stalls before it even begins: compromises may occur on the micro-level between entrenched elites, but not between residents of the halls of power and oppositional outsiders. Without communicating with those on the periphery, political decisions made in the core will never be legitimate, and may in fact be impossible.

2.2: Compromise and dissent

2.2.1: Deep dissent demands compromise: the "next affected" principle

In *Moral Consciousness and Communicative Action*, Habermas presents what he calls the discourse (D) principle—but what, for simplicity's sake, is often called the "all affected" principle—for determining the validity of norms: "Only those norms can claim to be valid that

⁴ Jürgen Habermas, "Religious Tolerance: The Pacemaker for Cultural Rights," *Philosophy* 79 (2004): pp. 8-9.

meet (or could meet) with the approval of all affected in their capacity *as participants in a practical discourse*” (emphasis original).⁵ While it was originally offered in the context of a separate universalization (u) principle, a sort of neo-Kantian moral theory with a communicative spin (norms must be universalizable in actual discourse), its application to democratic politics was immediately apparent: discursive settings must be fair and free from exclusion or coercion.⁶ This was made explicit when Habermas offered the “democratic principle” in *Between Facts and Norms*: “the democratic principle states that only those statutes may claim legitimacy that meet with the assent (*Zustimmung*) of all citizens in a discursive process of legislation that in turn has been legally constituted.”⁷

The discourse and democratic principles, if actually practiced, would have far-reaching effects on the structure of power relations within democratic politics. Indeed, the logical conclusion of the (U) and (D) principles for politics would be something approaching transnational democracy: though this feature is neutralized when Habermas limits the democratic principle to “citizens,” a principle of political legitimation based on “all affected” would expand the deliberative public sphere beyond national borders on issues ranging from immigration to environmental policy. Rather than the traditional conception of a people demarcated by blood or territorial boundaries, anyone who has an actual interest in the law should be considered members of the political community. However, it is nevertheless vulnerable to many of the same

⁵ Jürgen Habermas, *Moral Consciousness and Communicative Action*, trans. Christian Lenhardt and Shierry Weber Nicholsen (Cambridge, Mass.: The MIT Press, 1990): p. 66.

⁶ Despite their similarities, Habermas explicitly intends the democratic principle to operate “at *another level* than the moral principle” (emphasis original). Both the universalization and democracy principles rely on the baseline (D) principle, but the (D) principle itself is a neutral means of adjudicating the validity of *all* action norms, and the possibility of discursive validity is merely assumed in both of the former principles: “The discourse principle is only intended to explain the point of view from which norms of action can be *impartially justified*; I assume that the principle itself reflects those symmetrical relations of recognition built into communicatively structured forms of life in general... Specifically, one must show for each type which rules would allow pragmatic, ethical, and moral questions to be answered. We might say that these various rules of argumentation are so many ways of operationalizing the discourse principle.” Habermas, *BFN*: pp. 108-109.

⁷ Habermas, *BFN*: p. 110.

criticisms that have been targeted at Habermas by his critics on the left. Namely, it is an inappropriately static principle, focused narrowly on determining what is legitimate *now* while discounting what may emerge in the future. Like deliberative democracy in general, it puts too high a value on political closure. While it is an exaggeration to say that the discourse principle requires democratic citizens to discursively achieve consensus, it does seem to assume that all affected are at least identifiable before parties enter into practical discourse. This may have some status quo plausibility—the affected parties to, say, a trade agreement may be fairly easily determined (even if many of them are routinely excluded from the negotiations), with states, transnational corporations, smaller local merchants, consumers and laborers some of the most obvious groups with a stake—but politics is not a strictly status quo activity. The decisions that are made by democratic bodies inevitably project themselves into the future, intersecting with the livelihoods and identities of countless parties in unforeseeable ways.

The politics of Lebanon—a country that has been split by deep dissent as much as any other political community in the world—provides an excellent example of this process. After the end of the French mandate in 1943, the major religious and ethnic groups of Lebanon negotiated what is known as the National Pact, an unwritten agreement that established a 6-5 ratio in the nation's parliament between Maronite Christians and Muslims, respectively. This ratio, which itself was based on the 1932 census, stood for almost 50 years until the Taif Agreement that ended the 15-year Lebanese Civil War. The war itself was deeply related to the political arrangement created by the National Pact: despite the massive growth of Lebanon's Muslim population relative to its Christian population, political power was calcified in the hands of what had become the Christian minority. While the Taif Agreement established a new, codified constitutional ratio of 1-1, it is still at odds with the country's contemporary demographics

(today the country is approximately 60 percent Muslim and 40 percent Maronite Christian), and Lebanese democracy continues to be compromised by an entrenched agreement that failed to account for changes in identity (and concomitant changes in political self-understanding) in the future.⁸

Beyond this (and this is more of a practical concern than a philosophical problem with Habermas's principle) it is almost impossible to foresee all of the particular claims of affectedness before parties enter into a "discursive process of legislation." This is true not only because of the generic fact that most decisions produce unforeseen consequences, but also because there are always structural blind spots regarding whose and what type of interests qualify as compelling. This type of selective exclusion is readily apparent in, for instance, many historical decisions of states in the Americas vis-à-vis indigenous peoples. This is a familiar story in the United States, of course, whose land policy in Western states in the twentieth century often disrupted cultural practices for thousands of American Indian people, but it also continues today across the Americas. Brazil, for instance, has been embroiled for years in a controversy over the construction of the Belo Monte Dam on the Xingu River, a tributary of the Amazon. While Brazilian political leaders claim that the hydroelectric dam is necessary for the nation's growing energy needs, it would also displace about 20,000 mostly indigenous people. After indigenous groups were permitted to testify before the national legislature, the Supreme Court recently ruled that the dam may go forward, sacrificing the interests of a remote group of largely

⁸ Central Intelligence Agency, World Fact Book, accessed October 8, 2012, <https://www.cia.gov/library/publications/the-world-factbook/geos/le.html>.

invisible people in favor of the São Paulo and Rio de Janeiro elites' interest in cheap electrical power.⁹

By itself, then, Habermas's principle of democracy is insufficient. To truly take into account "all affected," any democratic principle has to consider the contingency and futurity of identities in the political community. This is what I hope to provide in the "next affected" principle. The next affected, or (N) principle can be stated as an adaptation of Habermas's discourse principle as follows:

(N): Only those rules can claim to be valid that meet (or could meet) with the approval of the next affected in their capacity as participants in a practical discourse.

Under this principle, the constitution of Lebanon did not simply meet with a practical hurdle when the Shiite population burgeoned in the 1970s and 1980s; rather, it lost whatever fundamental legitimacy it had ever had. Similarly, the unconsidered types of affectedness that have been pressed by indigenous peoples render the original discursive processes—whether they were conducted in good faith or not—moot. No-saying remains critical beyond the first act of discursive political will-formation; more "no"s may be pressed infinitely into the future, no matter how legitimate a discursive process may be.

While I mean the (N) principle as an incorporation of a certain type of radical critique into Habermas's framework of deliberative democracy, I want to emphasize that the democratic principle retains its importance for adjudicating the relative legitimacy of political decisions. The key point to remember is, as Jane Mansbridge reminds us, that state coercion is ultimately always imperfect, but that "a theory of democratic action must also work to make institutions

⁹ See e.g. Jill Langlois, "Belo Monte dam work to resume in Brazil," *GlobalPost*, August 28, 2012, accessed October 8, 2012, <http://www.globalpost.com/dispatch/news/regions/americas/brazil/120828/belo-monte-dam-work-resume-brazil>.

more and more democratically legitimate, while recognizing the good that can be accomplished by democratic coercion that is, at best, only imperfectly legitimate.”¹⁰ Political decisions are more or less legitimate according to the extent to which legitimating discourses are inclusive of affected parties. These decisions should always be dynamically understood by deliberators as contingent and incomplete, but in the status quo not all decisions are created equal. Again quoting Mansbridge, “a political theory of democratic action demands a corresponding theory of imperfect legitimacy. Legitimacy is not a dichotomy—a thing you either have or do not have. It is a continuum from more to less.”¹¹

Fundamentally, the (N) principle forces the parties to any discursive process to consider their decisions not as final judgments but as compromises. Whether there was outright exclusion of certain groups from the discourse or whether the world has simply changed, all decisions that bear on the self understanding of a political community must be understood as provisional.

2.2.2: Compromise needs dissent: the example of civil disobedience

Civil disobedience has at least a dual role in the politics of democratic compromise. On one level, its role in the type of compromise I am describing should be clear: the (N) principle from above implies a certain model of political obligation in addition to a criterion of political action. The law is only binding insofar as it has taken into consideration the interests of all, dynamically understood; when new identities and interests emerge, the bindingness is revoked, or at least relaxed. In these situations, acts of civil disobedience are legitimate if the legal order is not adjusted to take account of them.

¹⁰ Jane Mansbridge, “On the Importance of Getting Things Done,” 2011 Madison Lecture, *PS* (January 2012): p. 4.

¹¹ *Ibid.*: p. 5.

At the same time, however, civil disobedience is itself also a *form* of communication, and one that is particularly important for political compromise. This is so because compromise is always a non-ideal process; it is what must be used when the fiction of the ideal speech situation or the overlapping consensus inevitably falls apart. Public civil disobedience is more than the outward manifestation of a moral imperative; as Habermas writes in *Between Facts and Norms*, it is also “the last means for obtaining more of a hearing and greater media influence for oppositional arguments.”¹² By symbolically resisting laws that they “consider illegitimate in the light of valid constitutional principles,” the parties to civil disobedience are simultaneously creating a sort of theatre for the outside observer, expressing the laws’ injustice through their own (often brutal) encounter with the state. Civil disobedience achieves its communicative component by illustrating a problem.

Civil disobedience appeals to the imagination of the political audience in a fairly straightforward way: civil disobedience makes injustice *real* for the observer. The power of the state is revealed as a concrete, oppressive force—even when it has the form of democratic law—in the life of some category of citizens.¹³

This is all to say that disobedience has a place in democratic politics and theory beyond discussions of political obligation. Rather than the moral status of civil disobedience, I am interested in its role as a democratic practice.

But if my goal is illustrating a path to just democratic compromise, is civil disobedience really the best vehicle? Critics may wonder whether disobedience is precisely the opposite, an *impediment* to rather than a means for achieving compromise. Jane Mansbridge, for instance, has argued persuasively that most injustices in democratic societies fall far short of the sort of grave harms that justify resistance to the law; achieving at least partially legitimate collective action is

¹² Habermas, *BFN*: p. 382.

¹³ White and Farr: p. ??.

frequently more important than counterproductively seeking final, fully deliberatively justified law. This requires coercion.

Democracies need coercion primarily to take action without overly privileging the status quo. When individual interests come in what gives every indication of being an irreconcilable conflict, a democratic polity must either reinforce the status quo by taking no action or, by taking action, force or threaten (coerce) some of its citizens into situations or actions not in their interests. Majority rule is one standard mechanism for achieving a relatively fair form of democratic coercion.¹⁴

In her 2011 Madison Lecture, Mansbridge reiterates that resistance or disobedience are rarely justified in “partially legitimate” democratic regimes: “In the tension between resistance and action, context is critical. Tyrannical regimes demand resistance. Deeply corrupt regimes cannot justly claim legitimacy. But when the threat of tyranny is relatively weak and corruption relatively limited, the need for collective action is often greater than the need for resistance.”¹⁵ According to this interpretation, oppositional tactics such as civil disobedience are more likely to cause constant gridlock in the name of irreconcilable conceptions of justice rather than move politics toward just compromises.

As these passages indicate, the idea that disobedience can help rather than hinder compromise is counterintuitive; justifications for civil disobedience are typically premised on the idea that citizens do not have a moral obligation to obey unjust laws—its purpose, it seems, is to resist injustice now, not to create a more substantively just future. Nevertheless, there are clear ways—on both a theoretical and practical level—that civil disobedience is more than a claim of “here I stand, I can do no other,” as Martin Luther reputedly said before the Diet of Worms. There are three reasons to doubt that civil disobedience is always destructive, and to believe that civil disobedience can be understood as a positive as well as negative act.

¹⁴ Mansbridge, “Using Power/Fighting Power: The Polity,” in *Democracy and Difference: Contesting the Boundaries of the Political*, ed. Seyla Benhabib (Princeton, NJ: Princeton University Press, 1996): p. 47.

¹⁵ Mansbridge, “On the Importance of Getting Things Done”: p. 5.

First, even if civil disobedience is not an efficient way to encourage compromise in the democratic state, it is nevertheless a necessary one. As Habermas writes in “Religious Tolerance: The Pacemaker for Cultural Rights,” the democratic constitution is always a self-referential document, as the means for settling constitutional controversies are enclosed in the document itself:

A [democracy that is defensive of its basic normative commitments] can sidestep the danger of paternalism only by allowing the self-referentiality of the self-establishing democratic process to be brought to bear on controversial interpretations of constitutional principles... With a legal recognition of ‘civil disobedience’ (which does not mean it does not punish such acts), the tolerant spirit of a liberal constitution extends even beyond the ensemble of those existing institutions and practices in which its normative contents have become actually embodied so far.¹⁶

This is a profound insight into the nature of dissent and its role in democratic politics, not only for Habermas exegesis but for our understanding of democracy in general. “Democracy—whether deliberative or not—is caught in a feedback loop, and the threat or possibility of civil disobedience must always remain to interrupt the conceptual loop at the heart of democracy.” In introducing outsiders to break democracy’s circularity, “Civil disobedience ‘side-steps’ the paradox that results from democracy’s self-referential character by pulling the democratic process outside of its otherwise closed institutional loop.”¹⁷ Not only is civil disobedience—and, more broadly, dissent—not an obstruction to compromise, it is critical to it.

Second, and as a corollary to the argument above, the sort of coercion that Mansbridge urges closes avenues to political compromise in the same way that tolerance for dissent opens them up. In the passage of “Using Power/Fighting Power” cited above, she argues that in the face of “irreconcilable differences,” the democratic state has no choice but to coerce policy losers into

¹⁶ Jürgen Habermas, “Religious Tolerance: The Pacemaker for Cultural Rights,” *Philosophy* 79 (2004): pp. 8-9. The bracketed section was altered from the more awkward phrase “self-defensive.”

¹⁷ White and Farr: p. 48.

following (presumably) the will of the majority.¹⁸ This stance, though, is highly counterproductive. Instead of throwing our hands in the air and coercing, we should recognize that even the most polarizing and vituperative controversies are, at least in a limited sense, “reconcilable.” For instance, my home state of Oregon has one of the most acrimonious urban-rural divides in the United States. Unsurprisingly, these disputes largely center on land use policy, and specifically the status of Oregon’s forests. While the positions of an environmentalist from Portland and a laid-off mill worker from one of the state’s many dying timber towns may be irreconcilable—with one arguing that we can afford scaling back clearcutting even further to curb global warming and protect the state’s fragile wilderness ecologies, and the other arguing that a renewed free-for-all on old growth trees is necessary—the grounds for compromise are not nonexistent. In this case, the path to compromise is clear—some sort of quantitative balance between trees that are saved and forests that are cut—and simply using the coercive power of the state to “get things done” (particularly when the timber companies, as Oregon’s largest industry, have outsized influence in state politics) has clear harms.

Second, taking a more permissive stance than Mansbridge toward civil disobedience does not necessarily entail undermining the state’s authority on a practical or moral level. Rather, the form of communication embodied in civil disobedience¹⁹ *symbolically* undermines the law. Except in extraordinary circumstances (circumstances under which Mansbridge presumably would agree that civil disobedience is necessary and justified, like the Jim Crow South or colonized India), disobedience is unlikely to undermine the overall edifice of the democratic state. In the end—as Habermas, for instance, makes very clear—the state retains both its

¹⁸ Mansbridge, “Using Power/Fighting Power”: p. 47.

¹⁹ Here I do not mean to cede that civil disobedience entails an “embodied argument” in the strictly deliberative sense. As a form of aesthetic or symbolic communication, civil disobedience is more complicated than the assertoric status of formal argumentation. See White and Farr, pp. 43-47.

practical and moral authority to coerce its citizens. Civil disobedience plays a symbolic and pragmatic role as an indispensable catalyst of political change, not as a broad barrier to the possibility of state action.

2.3: How to compromise with an Occupier

In the last chapter, I used the Occupy Wall Street (OWS, or Occupy) protests as an example that illustrates the distinction between deep dissent and liberal pluralism. I argued that mass, generalized rejections of a dominant form of life or self-understanding (as Occupy was) render clean distinctions between “political” and “comprehensive” doctrines untenable. While the Occupiers did not offer a thick conception of the good life, they did offer a denunciation of the status quo as the *bad* life. In this section, I turn to the affirmative potential of compromising with the participants of Occupy. First, I will detail the demands of the Occupiers, such as they were. Second, I will describe a potential compromise solution between Occupy and defenders of the status quo. Finally, I will extend the comparison from Chapter 1 between myself and John Rawls, illustrating how taking deep dissent seriously entails major departures from the Rawlsian paradigm.

2.3.1: The claims of Occupy Wall Street

Occupy’s negative claims have always been fairly clear: they were against late-modern finance and its consequences, including not only the radical inequality produced by financiers’ compensation packages, but also the inscrutable opaqueness of the system itself and the disproportionate social and political power enjoyed by its beneficiaries. The movement’s affirmative claims, however, have been complex and controversial from the beginning: as

Marina Sitrin, a participant in the movement, described it, Occupy was “one no” with “many yeses.”²⁰ Kalle Lasn and Micah White of *Adbusters* (the originators of the “Occupy Wall Street” meme) originally envisioned the encampment as a protest centered around a single demand—immortalized in the famous ballerina-on-the-bull poster announcing the encampment.²¹ As the “horizontal” organization took hold on the ground in Zuccotti Park, however, the question “what is our one demand?” quickly became iconic in its irony; because Lasn and White never positioned themselves as leaders of the movement, the demands inevitably became multiple and (at least to some extent) contradictory. Naturally, this makes envisioning a compromise a bit like eating jell-o with a fork and knife. Nevertheless, I will attempt to draw out some of Occupy’s core claims in a way that is both clear and avoids eliding the movement’s complexity.

To illustrate how a legitimate compromise may have been struck between OWS and allies of the financial industry in government, I will focus in this section on the Consumer Financial Protection Board (CFPB). The CFPB was set up under the Dodd-Frank Wall Street Reform and Consumer Protection Act, passed in 2010 as a regulatory response to the financial crisis that touched off the “Great Recession” of 2008-2009. While Dodd-Frank was designed precisely to address many of the problems that animated Occupy Wall Street—the unaccountable systemic risk of the derivatives market, the opaqueness of hedge funds, the ability of commercial banks to invest depositors’ money in high-risk financial instruments—it is nevertheless itself a strikingly opaque and inscrutable piece of legislation, with most of the specific functions of the

²⁰ She associates this feature with horizontal organizational methods both in Occupy Wall Street and the Argentine Left, particularly after that country’s own major financial crisis in 2001. Marina Sitrin, “One No, Many Yeses,” in *Occupy! Scenes from Occupied America*, eds. Astra Taylor et al. (London: Verso 2011): pp. 7-11.

²¹ Mattathias Schwartz, “Pre-Occupied: The Origins of Occupy Wall Street,” *The New Yorker*, November 28, 2011 <http://www.newyorker.com/reporting/2011/11/28/111128fa_fact_schwartz?currentPage=all>.

new regulatory apparatus left to agencies that remain outside the public gaze.²² The CFPB, which was designed to combat abuse in the mortgage, credit card, and student loan industries, is not immune from this criticism. While the agency has won near-universal acclaim from opponents of financial deregulation (possibly the only feature of Dodd-Frank about which this can be said), and while it incorporates a formal consumer complaint procedure into its operation, the specific decisions and sanctions are determined by the agency's bureaucrats.

Whether effective or not, a technocratic approach to consumer protection—or to regulating derivatives markets or monitoring thrifts—is deeply unsatisfying from the perspective of a participant in OWS. What Hardt and Negri refer to as “real democracy” was as central to the group's mission as was an indictment of inequality and corporate power:

One obvious and clear message of the protests, of course, is that the bankers and finance industries in no way represent us: What is good for Wall Street is certainly not good for the country (or the world). A more significant failure of representation, though, must be attributed to the politicians and political parties charged with representing the people's interests but in fact more clearly represent the banks and the creditors. Such a recognition leads to a seemingly naive, basic question: Is democracy not supposed to be the rule of the people over the polis -- that is, the entirety of social and economic life?²³

The primary targets of OWS's democratic critique were naturally the very wealthy and large corporations, both of which exercise a disproportionately large—and growing—influence in the American political system. As the “Declaration of Occupation” (accepted by the Zuccotti Park General Assembly in the early stages of the encampment) states, “a democratic government derives its just power from the people, but corporations do not seek consent to extract wealth from the people and the Earth,” and “no true democracy is attainable when the process is

²² A concise summary of Dodd-Frank can be found here: Kimberly Amadeo, “Dodd-Frank Wall Street Reform Act: A Summary of Its Regulations,” *About.com* <<http://useconomy.about.com/od/criticalissues/p/Dodd-Frank-Wall-Street-Reform-Act.htm>>.

²³ Michael Hardt and Antonio Negri, “The Fight for ‘Real Democracy’ at the Heart of Occupy Wall Street,” *Foreign Affairs*, March 11, 2011 <<http://www.foreignaffairs.com/articles/136399/michael-hardt-and-antonio-negri/the-fight-for-real-democracy-at-the-heart-of-occupy-wall-street>>.

determined by economic power.”²⁴ At the same time, however, this same critique of concentrated corporate power can be extended to concentrated bureaucratic power in the administrative state: agencies like the CFPB—or the Securities and Exchange Commission, the Commodity Futures Trading Commission, or the myriad other agencies and offices housed in the fifteen departments of the U.S. federal government—are only indirectly democratic (insofar as they are created by and subject to review by Congress) and are too opaque in their operations for most citizens to have a detailed understanding of how they operate. Moreover, when the corporations at the heart of OWS’s grievances have, in the Declaration’s words, “donated large sums of money to politicians, who are responsible for regulating them,” even the tenuous popular sovereignty represented in the legislative branch is compromised.²⁵

2.3.2: Structure of a compromise with Occupy Wall Street

Compromising with an occupier would entail more than remaking the financial system in a more egalitarian and transparent image. What the 99% lacked in comparison to the 1% was not only material wealth, but also political influence. As Sidney Tarrow has argued, Occupy was not a traditional political protest movement with specific goals it was trying to accomplish, but a “constituent moment”: “Occupy Wall Street is what we might call a ‘we are here’ movement. Asking its activists what they want, as some pundits have demanded, is beside the point...By their presence, they are saying only, ‘Recognize us!’”²⁶ Compromise under conditions of deep dissent requires more than administrative changes to the state’s regulatory or legal structure. It

²⁴ “Declaration of the Occupation of New York City,” New York City General Assembly, September 29, 2011 <<http://www.nycga.net/resources/documents/declaration/>>.

²⁵ Ibid.

²⁶ Sidney Tarrow, “Why Occupy Wall Street is Not the Tea Party of the Left,” *Foreign Affairs*, October 10, 2011 <<http://www.foreignaffairs.com/articles/136401/sidney-tarrow/why-occupywall-street-is-not-the-tea-party-of-the-left>>.

also calls for serious respect for the claims of citizenship being made by the dissenters, and this is what I try to capture with the (N) principle.

In the compromise and dissent model, the problem with the status quo was not only material inequality, but also the lack of discursive legitimation—both now and in the future—of the policies and practices that created that inequality. This problem is evident in the process that led to the passage of the Gramm-Leach-Bliley Act—which, as I discuss in the introduction, allowed the merger of commercial and investment banks, and was one of the specific pieces of legislation often indicted as a cause of the 2007-08 financial crisis. Ironically, at the time of the law’s passage the language that was used by its proponents fixated on the future, at least superficially. At its signing ceremony, Treasury Secretary Lawrence Summers claimed that the law “takes a major step forward towards the 21st century” by providing the “right framework for America's future financial system.”²⁷ Similarly, co-sponsor Senator Phil Gramm praised the legislation as a “deregulatory bill,” which he believed was “the wave of the future,” while President Clinton said the bill would “make sure that the 21st century economy really works for our country and works for the people who live in it.”²⁸ Clinton even made a (at least implicit) nod to the relation between futurity and compromise, saying that on issues like Gramm-Leach-Bliley Republicans and Democrats “can come together in constructive and honorable compromise to keep pushing our country into the possibilities of the future.”²⁹

Despite surface-level similarities, however, none of these statements evinced an understanding of futurity that satisfies (N). The reason is that each of the speakers at the Gramm-Leach-Bliley signing ceremony expressed excessively high confidence in their own prescience:

²⁷ “Statement by President Clinton at the Signing of the Financial Modernization Bill,” White House Office of Public Affairs, November 12, 1999 <<http://www.treasury.gov/press-center/press-releases/Pages/ls241.aspx>>.

²⁸ Ibid.

²⁹ Ibid.

the legislation was not futurity-oriented in a way that emphasized its own provisionality, but rather in a way that assumed that the interests of American citizens could be foreseen in advance. This was the futurity of a futurologist, not of a compromiser. Instead of confidently declaring deregulation the “wave of the future,” the designers of the 1999 Financial Services Modernization Act (and the designers of a hypothetical compromise today) should have structured the legislation as a provisional compromise grounded in forward-looking inclusivity. What would such a compromise look like?

First, robust citizen involvement should be built into the operation of the financial regulatory bureaucracy. When Gramm-Leach-Bliley was reformed in 2010, institutions like the CFPB should have been designed as transparent institutions featuring not only citizen input via a complaint process, but also citizen representation. Ostensibly, the CFPB already has citizen involvement through the Consumer Advisory Board (CAB), which it describes as “a crowdsourced group of experts on consumer protection, consumer financial products or services, community development, fair lending, civil rights, underserved communities, and communities that have been significantly impacted by higher priced mortgage loans.”³⁰ In practice, however, the CAB is made up almost entirely of banking executives, nonprofit directors, and academics.³¹ Instead of assembling a group of people who were already influential in the world of finance, the CFPB could have assembled a group of citizens with a wider range of geographic bases, income levels, and connections to the banking industry. While a group of citizens such as this will never neutralize the possibility of outside eruptions like Occupy Wall Street (nor should it), it will

³⁰ “Advisory Groups,” Consumer Financial Protection Bureau <<http://www.consumerfinance.gov/advisory-groups/>>.

³¹ “Consumer Advisory Board Members,” Consumer Financial Protection Bureau <http://files.consumerfinance.gov/f/1209_cfpb_cabbios.pdf>.

create a closer connection to the democratic process within the functioning of the administrative state itself.

Second, the financial regulations introduced by the legislation should be subject to a mandatory review process, ideally including sunset provisions. In the introduction, I discussed how sunset provisions—particularly on matters which exist under a storm of deep dissent, such as state surveillance or the banking system—are a natural normative consequence of the next affected principle: because we can know neither the full empirical consequences nor the future contours of affectedness that any law or regulation will have, they should be designed as temporary experiments in democracy, or (if there is some compelling reason to exclude a formal expiration date) at least in such a way that they are not prohibitively difficult to change. In the case of the Gramm-Leach-Bliley or Dodd-Frank acts, sunset clauses would have not only given the technocrats satisfaction that the laws were working the way they were intended, but also—if designed in a way that maximized public inclusion—given voice to the parties who were adversely affected in a way that was unforeseen at the time of their original passage, particularly if they were implemented alongside robust public consultation requirements. A consultation process that satisfied (N) not only should include something like the citizen involvement described in the previous paragraph, but also a more direct engagement with citizens who are not formally connected to the administrative state. While it may seem fanciful to imagine members of the Senate and House Finance committees—along with officials from the Treasury, Commerce, and Labor departments—going on a traveling roadshow of “deliberation days” in town halls, high school gymnasias, and public libraries across the country, something along these lines is necessary to secure legitimacy for the regulation of the financial system. The key point is that any compromise should be designed in a way that tears down the walls that protect the

administrative state from the “siege” of communicative power, both in status quo conflagrations like Occupy Wall Street or future claims of voice that are impossible to envision in advance. As I argued earlier, all compromises are reached with the future in mind; by requiring that the defenders of a law or regulatory order directly justify their position in the informal public sphere, we can force them to consider the future in the right way.

Finally, there are a number of substantive points of compromise that are specific to the demands of the Occupy Wall Street movement and income inequality in the United States. Some of these have a procedural component: in designing the structure of public input in administrative decisions, for instance, agencies like the CFPB or legislative committees like the Senate Finance committee should be designed in a way that recognizes the positive *good* of wide citizen participation rather than the spare, formal *right* to participate; in Fishkin and Ackerman’s original “Deliberation Day” article, for instance, the authors proposed that citizens who attend deliberative assemblies should receive monetary compensation.³² Additionally, because OWS focused specifically on inequality, it may be that laws on financial regulation (or other areas, such as tax policy, that similarly bear on wealth distribution) could be designed with a “trigger” requiring reevaluation when certain economic thresholds are passed (high poverty rates or Gini coefficients, for instance). In general, however, my model of compromise primarily leaves the substantive components of agreements in the status quo to the compromisers themselves. Except where it bears on inclusiveness, it does not particularly matter whether, say, a bargain had been struck between those who wanted to let the banks collapse and advocates of the Troubled Asset Relief Program (TARP) to temporarily nationalize failing financial institutions. In compromise and dissent, the future matters more than the present.

³² Bruce Ackerman and James Fishkin, “Deliberation Day,” *Journal of Political Philosophy* 10 (2002): p. 129.

2.3.3: *Compromise and dissent versus Rawlsian liberalism*

This concrete account of compromise under conditions of deep dissent also highlights some of the differences with Rawlsian liberalism that I alluded to in the previous chapter. While a Rawlsian can criticize financial deregulation on the grounds of the difference principle, the specifically democratic and future-oriented character of the compromise described above would not be a requirement under Rawls's understanding of a just basic structure. In this subsection, I will illustrate this point by focusing on three areas of Rawls's thought: the operation of the difference principle, the requirement of public justification, and the idea of a stable conception of justice.

Because the claims of Occupy Wall Street centered on economic inequality, Rawls's work on distributive justice—and particularly his second principle of justice, including the difference principle—are particularly relevant. As presented in *Justice as Fairness: A Restatement*, the difference principle states that “Social and economic inequalities are to...be to the greatest benefit of the least-advantaged members of society.”³³ On the surface, there is much overlap between the difference principle and the demands of OWS. Were Rawls alive in 2011, he almost certainly would have agreed with the protestors that the level of inequality in twenty-first century America constituted injustice: a quick glance at economic history indicates that the material quality of life for middle- and lower-income residents during the mid-twentieth century was very similar to the present while the gap between the least and most advantaged citizens was much smaller. Indeed, in the latter sections of the *Restatement*, when Rawls details some of the major institutions of a regime that satisfies the two principles of justice (which he calls “property-owning democracy”), many of the specific policies and reforms would constitute

³³ John Rawls, *Justice as Fairness: A Restatement* (Cambridge, Mass.: Belknap, 2001): pp. 42-43.

radical departures from the status quo United States; for instance, taxes, whether on income, inheritance, or consumption, would be designed “solely to prevent accumulations of wealth that are judged to be inimical to background justice” rather than “for the purpose of raising funds.”³⁴ Rawlsian justice would, at the very least, require a much more egalitarian tax structure than the status quo in order to qualify as just.

At the same time, however, a just basic structure would not necessarily require the type of provisions described in the previous section, and in some cases might forbid them. First, nothing about the difference principle itself requires the level of democratic involvement called for by the (N) principle. While Rawls’s liberal principle of legitimacy is ostensibly democratic—stating that that “our exercise of political power is fully proper only when it is exercised in accordance with a constitution the essentials of which all citizens as free and equal may reasonably be expected to endorse in the light of principles and ideals acceptable to their common human reason”—it nevertheless leaves room for a great deal of technocratic power within the limits of a democratically legitimate constitution.³⁵ This applies fairly obviously to the difference principle, which Rawls emphasizes in both *A Theory of Justice* and the *Restatement* to be abstract and fundamentally imprecise in its concrete operation.³⁶ Because of its technical nature, it would seem that the difference principle is best adjudicated by the people’s representatives in consultation with experts, and is best implemented indirectly through changes in the rates of taxation. Second, and related to this last point, the operation of the difference principle ought to be, in Rawls’s view, very narrow: rather than applying to “every policy

³⁴ Ibid.: p. 161.

³⁵ John Rawls, *Political Liberalism: Expanded Edition* (New York: Columbia, 2005): p. 137.

³⁶ E.g. Rawls, *JAF*: pp. 161-162; John Rawls, *A Theory of Justice* (Cambridge, Mass.: Belknap, 1971): pp. 372-373. In the latter citation, Rawls also explicitly states that the justification of civil disobedience relies on violations of the first principle (equal basic liberties) only, because “there is usually a wide range of conflicting yet rational opinion as to whether [the second] principle is satisfied,” meaning that “the resolution of these issues is best left to the political process.”

matter,” he proposes that we select “a few instruments, as we may call them, that can be adjusted so as to meet the difference principle, once the whole family of policies is given.”³⁷ The compromise sketched above, however, suggests a deeper and more systemic relation between democracy and inequality: the political public sphere should be marshaled in *any* scenario that exhibits deep dissent, and all components of state policy should be susceptible to the communicative power generated in the public sphere. A compromise that simply sets a tax rate and assures (even in good faith) that it satisfies the difference principle is insufficient in this situation, even if *most* citizens ultimately agree.

More broadly, the compromises outlined in the last section, and the (N) principle in general, entail a rejection of “stability” as a controlling goal of the design of political institutions. It is important to note that when Rawls discusses the stability of a well-ordered basic structure, he is chiefly concerned with the extent to which principles of justice are “self-supporting,” or “whether people who grow up in a society well ordered by the two principles of justice...acquire a sufficiently strong and effective sense of justice so that they normally comply with just arrangements and are not moved to act otherwise, say, by social envy and spite, or by a will to dominate or a tendency to submit.”³⁸ In other words, Rawls believes that a conception of justice (and justice as fairness in particular) should be “stable” in the sense that citizens do not have a temptation to act in ways that violate the principles of justice. At the same time, however, it is not the case that individual members of a society reject dominant conceptions of justice *only* for egoistic or spiteful reasons. Genuine disputes also routinely arise over whether the dominant conception of political justice is an acceptable one. This is what was occurring in the case of Occupy Wall Street.

³⁷ Rawls, *JAF*: p. 161.

³⁸ *Ibid.*: p. 181.

The idea that deep dissent mandates provisional compromise is based on the idea that asking for a fully stable and enduring conception of justice is disrespectful of future dissenters. It is not only the case that we cannot *empirically* devise a set of basic principles that will be likely to endure in an overlapping consensus, but also that we should not *morally* attempt to do so. As Habermas writes in his exchange with Rawls, an over-fixation on stability means that citizens in the present “cannot reignite the radical democratic embers of the original position in the civic life of their society, for from their perspective all of the *essential* discourses of legitimation have already taken place within the theory; and they find the results of the theory already sedimented in the constitution.”³⁹ The upshot of this is a sort of moral inequality between citizens in the present and citizens in the future: the designers of our principles have the privilege of exercising democratic agency to a much greater extent than future generations, as the latter will only have the ability to reflexively approve of the results of discourses that have already occurred. Whether in the form of sunset clauses or citizen review commissions built into economic policies, the (N) principle is based on the principle that legitimacy can only be achieved through an ongoing process of compromise and dissent.

2.4: Compromise in the literature

My project comes in the midst of a boom of academic interest in compromise. In this subsection, I will situate my project relative to this literature, with particular focus on the recent work of Chiara Lepora, Avishai Margalit, and Amy Gutmann and Dennis Thompson. Each of these authors provides critical insight into the moral and political stakes at work in compromises and the practice of compromising. However, I believe that my project is operating at a different level

³⁹ Habermas, “Reconciliation through the Public Use of Reason,” p. 69-70.

of analysis than most of the recent surge. Specifically, none of these writers give what I consider sufficient attention to the roles of political legitimacy or temporality in democratic compromise.

In “On Compromise and Being Compromised,” Chiara Lepora shifts the focus of compromise from an agreement one makes with others (interpersonal compromise) to an agreement one makes with oneself (or what she calls “*intrapersonal* compromise”). When an agent enters into a compromise with another party, she must make a decision about what principles must be sacrificed in order to conclude the arrangement. This creates—at least from a *pro tanto* perspective—risks of complicity that the compromiser must account for: “The question of ‘what is wrong with the compromise?’ is thus recast as a question of ‘what is my part in the wrongs being done as part of the compromise?’”⁴⁰ She goes on to discuss three categories of compromise and to analyze the moral stakes of each. “Substitution” compromises occur when two parties agree to forego certain of their principles and accept “some other principle... as a viable substitute for their previous principles.”⁴¹ “Intersection” compromises occur when the parties share a partially overlapping set of principles and agree “not to pursue the subset of principles opposed or incompatible with those of the other.”⁴² Finally, “conjunction” compromises occur “when agents’ full sets of principles are literally and wholly opposing, rather than merely pragmatically incompatible,” forcing each of the compromisers to not only forego some of their own principles but also to become active agents in the fulfillment of principles that are inimical to them.⁴³ While compromises of the substitution and intersection varieties merely require moral breaches of omission, conjunction compromises also demand *commission* of acts

⁴⁰ Chiara Lepora, “On Compromise and Being Compromised,” *Journal of Political Philosophy* 20 (2012): p. 1.

⁴¹ *Ibid.*: p. 8.

⁴² *Ibid.*: p. 9.

⁴³ *Ibid.*: p. 10.

that are contrary to an actor's sincerely held principles. For this reason, the risk of complicity is greatest under the last category of compromise.

Lepora is correct that the problem of complicity cannot be ignored. This is particularly relevant, for instance, if the compromise at hand involves cooperation with systems of blatant injustice. Something like this happened in the run-up to the 1964 Democratic National Convention, where the pro-civil rights Mississippi Freedom Democratic Party demanded to be seated in place of the segregated delegation that had been officially sent by the state's party. Ultimately, the compromise offered by Lyndon Johnson was to seat two at-large representatives of the MFDP alongside the entire all-white contingent.⁴⁴ Had the MFDP accepted the deal, they would have gained something over the status quo (two seats versus zero), but at the same time would have lent legitimacy to a political system in Mississippi that was brutally unjust. This jibes with the intuitions behind the (N) principle: compromises that are not inclusive are not legitimate.

At the same time, however, analyzing compromises purely through the lens of *pro tanto* moral judgments loses much of what is distinctive about specifically *democratic* compromises. While Lepora's analysis of complicity provides some insight into political decisions like the convention credentials case, its warnings apply equally well to private, individual compromises as they do to public, collective ones. The (N) principle, on the other hand, specifically creates a positive obligation to compromise on collective, political decisions. In short, political theory is not simply moral philosophy on a larger scale—and moral limits on what can be an acceptable compromise for individuals does not tell us everything we need to know about political compromise.

⁴⁴ Rick Perlstein, *Before the Storm: Barry Goldwater and the Unmaking of the American Consensus* (New York: Hill and Wang, 2001): p. 404.

While Avishai Margalit is similarly concerned with the problem of complicity, he also shifts the discussion from general moral compromises to specifically political compromises. His concern is with what he calls “rotten compromises,” a species of agreement that is intrinsically political: “I see a rotten political compromise as an agreement to establish or maintain an inhuman regime, a regime of cruelty and humiliation, that is, a regime that does not treat humans as humans.”⁴⁵ While Margalit’s examples mostly involve matters of war and peace (with “peace” being the good that can be secured by compromise at the cost of “justice”), his definition of rotten compromise again is informative in the MFDP case. To compromise with the Mississippi Democratic Party would have had the risk of maintaining an inhuman regime: the idea that political compromise could be satisfactory to all parties would have gotten in the way of condemning a system that treated Black Mississippians as less than human.

Although Margalit’s focus on the political brings his project closer to my own, it nevertheless differs from mine insofar as it is a negative theory of compromise rather than a positive one. While he generally commends compromises for the sake of peace that do not pass the “rotten” threshold, he is most concerned with delineating the contours of rottenness; Margalit tells us when compromises are *permissible*, but little about when they are *obligatory*. As a result, while *On Compromise* is an important resource for understanding the limiting conditions on democratic compromise, it nevertheless requires a positive supplement that I provide with (N).

The recent work on compromise that is closest to my own—and also the one that has arrived with the most fanfare—comes from the influential deliberativists Amy Gutmann and Dennis Thompson. In *The Spirit of Compromise*, Gutmann and Thompson address democratic compromise at its most intractable locus: national legislatures and, specifically, the United States

⁴⁵ Avishai Margalit, *On Compromise and Rotten Compromises* (Princeton, N.J.: Princeton University Press, 2010): p. 2).

Congress. The purpose of “valuing compromise,” they argue, is to overcome the status quo bias that inheres under an “uncompromising mindset”—a condition they see as an outgrowth of the contemporary “permanent campaign” in American politics. While the compromising mindset displays “principled prudence” and “mutual respect,” the uncompromising mindset is marked by “principled tenacity” and “mutual mistrust”; a system in which politics is viewed as something similar to a sports game, where each party is constantly attempting to score the most points over the other, will tend toward the intransigence of the latter.⁴⁶

While Gutmann and Thompson’s explicit focus on democratic theory naturally brings their work into closer alignment with my own, that very scope makes its problems loom larger. First, their focus on specifically *legislative* compromise leaves them unequipped to deal with the type of temporality that (N) is designed to address. To be sure, they are careful to argue that justifiable compromises must be maximally inclusive, and that this includes “future generations who cannot be directly represented, and whose very existence depends on which policies are adopted by present generations.”⁴⁷ However, this is too literal to fully bring on board the reality of political dynamism. The (N) principle is meant to include not only new physical human beings—immigrants or the recently born—but also new political subjectivities that have been excluded from past political discourses. To sufficiently address the temporal dimension of democratic politics, we have to conceive of dissent as something that emerges *constantly*, not only in 20-year generational cycles. Second, their discussion of the legitimacy or justification of political compromises is surprisingly thin. Indeed, they argue that any legislative compromise will inevitably “include elements that are jointly incoherent and inconsistent with any single

⁴⁶ Amy Gutmann and Dennis Thompson, *The Spirit of Compromise: Why Governing Demands it and Campaigning Undermines It* (Princeton, N.J.: Princeton University Press, 2012): pp. 16-17.

⁴⁷ *Ibid.*: p. 48.

theory” of political justice.⁴⁸ While the caveat of “single” makes the claim substantially more plausible, it leaves little room for an imperfect model of legitimacy that mines that radical potential of compromise—namely, its orientation toward futurity.

While the compromise boom has produced literature that is undoubtedly valuable on its own terms, my project is approaching the issue from a very different direction than the recent exponents. Compromises should not be considered in static terms, and the peculiar burdens of *political* compromise should not be neglected.

* * *

In this chapter, I have offered an outline of a theory of democratic compromise that is grounded in the demands of political dissent. Dissent is a fact of democratic life, and deep dissent places a moral burden on political actors: for democracy to be real, dissenters must be taken seriously. At the same time, dissent is crucial if democracy aspires to be anything beyond an alternative means of mass coercion: it is the only means for democracy to emerge from its “closed circle,” bound by an inescapably undemocratic constitution and dominated by elites.

As I said at the outset of this chapter, I consider compromise and dissent to be a third way between deliberative democracy and agonistic/radical democratic theory. In the following two chapters, I will illustrate how my project captures elements of both while avoiding their most serious pitfalls.

⁴⁸ Ibid.: p. 37.

Chapter 3: Consensus and dissent: compromise in deliberative democracy

As I have said previously, compromise and dissent is fundamentally a project in the deliberative democratic tradition. The purpose of democracy (if you will excuse the somewhat problematic language) is to achieve political legitimacy and to justify the coercion that permeates social relations. The most egalitarian means of reaching legitimation and justification is through an intersubjective reasoning process using the medium of linguistic and symbolic communication. Although the type of legitimacy that is feasible under conditions of deep dissent is always deferred into the future, the arc of the public sphere still must bend toward justification.

By introducing compromise and dissent, then, am I simply clarifying a component of the deliberative program that was already there? On the one hand, that is precisely what I am doing. As I will explain in the first section of this chapter, Jürgen Habermas's discourse theory of law and democracy has a tension created by his simultaneous insistence on consensus as the basis of legitimacy and full-throated defense of civil disobedience as the "litmus test of the democratic constitutional state." The foundation of compromise and dissent are embedded in Habermasian deliberative democracy, though Habermas himself only gestures toward it in his own work. This project fills in a gap in his theory by more thoroughly explicating the consequences of civil disobedience's role in democracy.

On the other hand, however, compromise and dissent mark a much more fundamental break from the deliberative paradigm. By conceptualizing legitimacy as perpetually "deferred," I am not only making note of the practical shortcomings of deliberative legitimacy, but also the conceptual impossibility of achieving full democratic legitimacy even as an idealization. Because dissent is always present, the consensus at the heart of Habermas's democratic principle is perpetually interrupted. Shifting from the traditional *all* affected principle to the *next* affected

principle not only undermines the possibility of a Rawlsian basic structure with a stable conception of justice, but also alludes to the impossibility of ever satisfactorily aggregating a stable *demos*, “all” of whom must accede to the coercive power of the state.¹ In short, the legitimacy at which compromise and dissent aims is one that lacks a vision of a perfect world against which we are meant to gauge our own democratic decisions. The (N) principle removes the ideal from the heart of the deliberative research program.

In this chapter, I will explain my break with deliberative democracy more fully. Because compromise and dissent is in part an addendum to Habermasian deliberation, I will focus specifically on Habermas and others working within the discourse theoretic tradition, with particular focus on Rainer Forst. In the first section, I will outline Habermas’s discourse theory of law and democracy and its relation to his earlier theory of communicative action, then go on to explain what I described as the “tension” in his theory between consensus-driven legitimacy and civil disobedience. In the next section, I will go on to describe the influential extension of discourse theory offered by Forst. In that section, I argue that Forst neutralizes the Habermasian tension by erring on the side of closure and stability over the openness and contingency suggested by the defense of civil disobedience. In the third and final section, I will demonstrate how compromise and dissent can square the circle of democracy’s simultaneous orientation toward closure and openness, reconciling the seemingly contradictory aims of consensus and dissensus in discourse theory.

¹Here I am referring to what Rawls refers to as “ideal theory,” the subject matter of justice as fairness. Under the limiting conditions of ideal theory, Rawls stipulates that many of the difficulties of the quotidian rough and tumble of political life must be dealt with after we have developed an ideal typical conception of justice. A Rawlsian, then, would likely argue that the issue of future dissent is simply a matter for non-ideal theory, and that nothing about the phenomenon of deep dissent precludes the possibility of ideal theory. By introducing the next affected principle, however, even the idealization of a stable basic structure is disrupted: while a theorist may imagine a society without immigration, for instance, she can’t very well imagine one where new citizens are never born and existing citizens never die without assuming away the material reality of politics as an association of humans. This is one important way in which the (N) principle interrupts idealizations.

3.1: Habermas's tension

Jürgen Habermas is probably the most influential proponent of what has been called “deliberative democracy” (though he does not typically use that language himself) of the past two decades. Many contemporary debates in democratic theory revolve around Habermas’s version of deliberation, whether the authors are radically rejecting it (e.g. Bonnie Honig or Chantal Mouffe) or subtly reappraising it (e.g. Iris Marion Young or Patchen Markell). That fact alone calls for situating compromise and dissent relative to discourse theory.

3.1.1: Discourse theory

Habermas’s influence in democratic theory largely stems from his 1992 book *Faktizität und Geltung* (literally “Facticity and Validity”) translated as *Between Facts and Norms* in 1996. As a sort of culmination of Habermas’s career, it synthesized much of the theoretical work that he had developed over the previous two decades—and provided the foundation for a generation of deliberative democratic theorists. Before explaining the gap I perceive in Habermasian deliberative democracy, I will briefly outline his discourse theory of law and democracy in this section.

Habermas begins, similarly to other major recent deliberative democrats, by describing the fact of pluralism and the unique justificatory burden that it places on modern societies. In pre-modern “traditional” society, he writes, the grounds of legitimation were premised on the shared history and beliefs of Western political communities; political authority was legitimate merely because people had come together into a political community for shared reasons. Thick ethical attachments—whether they were based in ethnicity, religion, language, or some other

characteristic—ostensibly provided a seamless basis for political association, whether that association is an absolutist monarchy or (in its modern guise) a nationalist republic.²

Whether “traditional” society ever existed in the idealized form that Habermas describes or not, it does not exist in the status quo. “Without the backing of religious or metaphysical worldviews that are immune to criticism, practical orientations can in the final analysis be gained only from rational discourse, that is, from the reflexive forms of communicative action itself.”³ Moreover, because justification can no longer be accomplished “simply by calling attention to the contexts in which they were handed down,” it “can be met only by *moral discourses* [Emphasis original]” (i.e. what is universally right for all) as opposed to “ethical discourses” (i.e. what is right for *us* as a discrete community).⁴ At the most basic level, the source of political legitimation in modern post-conventional settings is communicative action and discourse. Language, not pre-rationalized affective bonds, is what brings us together.

But why does Habermas assign a privileged place for language? The answer goes back to his earlier *Theory of Communicative Action* (hereafter *TCA*). While there is not space in this chapter to provide a full recap of the system of formal pragmatics Habermas outlined in that book, I do want to call attention to his famous contention that “reaching understanding is the inherent telos of human speech.”⁵ The distinctive place that language holds in Habermas’s corpus stems from its intrinsic egalitarian potential and its unique ability to coordinate action between parties. There is no guarantee that interlocutors will always engage in understanding-oriented communication (what Habermas calls “communicative action”); in fact, Habermas recognizes that a great deal of speech is better characterized as success-oriented strategic action,

² Habermas, *BFN*: p. 96-97.

³ *Ibid.*: p. 98.

⁴ *Ibid.*: p. 97.

⁵ Jürgen Habermas, *The Theory of Communicative Action, Volume One: Reason and the Rationalization of Society*, trans. Thomas McCarthy (Boston: Beacon Press, 1984): p. 287.

where the participant attempts to influence her interlocutors without necessarily seeking an agreement achieved through the exchange of reasons.⁶ The *potential* for communicative action or discourse (the process that ensues when one party takes a “no” position to an interlocutors speech act), however, is intrinsic to language itself.

The idea that language is inherently and uniquely capable of forging understanding [*Verständigung*] has a natural extension to the moral-political sphere, a connection Habermas began to develop in *TCA* and eventually explained in detail in *Moral Consciousness and Communicative Action*. In that work, he proposed the discourse (D) and universalization (U) principles as bases for the justification of moral validity claims. In essence, Habermas adds a dialogical dimension to Kantian ethics; similar to Kant, morality rests on the universalizability of any principle, but this universality can only be adjudicated intersubjectively in practical discourses where “every valid norm has to fulfill the following condition:”

(U): *All* affected can accept the consequences and the side effects its *general* observance can be anticipated to have for the satisfaction of *everyone's* interests (and these consequences are preferred to those of known alternative possibilities for regulation).⁷

Communicative action and discourse are particularly suited to the task of norm justification both because of their orientation toward understanding and the performative attitude that interlocutors adopt when they enter into a practical discourse.

The connection between discourse ethics and deliberative democracy was made explicit in *BFN*, where Habermas adapted the (D) and (U) principles into a “democratic principle,” which “states that only those statutes may claim legitimacy that can meet with the assent (*Zustimmung*) of all citizens in a discursive process of legislation that in turn has been legally constituted,” and

⁶ Ibid.: p. 286.

⁷ Jürgen Habermas, “Discourse Ethics: Notes on a Program of Philosophical Justification,” in *Moral Consciousness and Communicative Action*, trans. Christian Lenhardt and Shierry Weber Nicholsen (Cambridge, Mass.: The MIT Press, 1990): p. 65.

which “explains the performative meaning of the practice of self-determination on the part of legal consociates who recognize one another as free and equal members of an association they have joined voluntarily.”⁸ By shifting from “norms” to “statutes” and from “all affected” to “citizens,” Habermas adapts his discourse ethics into a comprehensive theory of deliberative democracy. Despite its close connection to discourse ethics, however, democratic deliberation will sometimes entail ethical discourses: “The medium of law is also brought to bear in problem situations that require the cooperative pursuit of collective goals and the safeguarding of collective goods. Hence discourses of justification and application also have to be open to a *pragmatic* and an *ethical-political use of practical reason*.”⁹ But Habermas is also careful to point out that—even in the context of discrete political communities reasoning about—moral discourses must always take precedence over other categories of communication, as ethical-political discourses’ “results must at least be compatible with moral principles.”¹⁰ Ethical-political “questions are subordinate to moral questions and connected with pragmatic questions.”¹¹

By placing the agency of communicators at the heart of his conception of morality, Habermas is able to make his procedural account of political justice consistent with the protection of substantive individual rights, and rights that extend beyond “those political civil rights, specifically the rights of communication and participation, that safeguard the exercise of

⁸ Habermas, *BFN*: p. 110.

⁹ *Ibid.*: p. 154.

¹⁰ *Ibid.*: p. 167.

¹¹ Jürgen Habermas, “Three Normative Models of Democracy,” in *Democracy and Difference: Contesting the Boundaries of the Political*, ed. Seyla Benhabib (Princeton: Princeton University Press, 1996): pp. 24-25.

political autonomy.”¹² He argues that “the classical liberties are co-original with political rights” because “human rights legally enable the citizens’ practice of self-determination”:

There is no law without the private autonomy of legal persons in general. Consequently, without basic rights that secure the private autonomy of citizens there is also no medium for legally institutionalizing the conditions under which these citizens, as citizens of a state, can make use of their public autonomy... This mutual presupposition expresses the intuition that, on the one hand, citizens can make adequate use of their public autonomy only if, on the basis of their equally protected private autonomy, they are sufficiently independent; but that, on the other hand, they can arrive at a consensual regulation of their private autonomy only if they make adequate use of their political autonomy as enfranchised citizens.¹³

Both rights and democracy are premised on the same recognition of humans as speaking beings who are capable of understanding validity claims. In part, this signifies Habermas’s inheritance of a Kantian notion of human dignity; however, by emphasizing the communicative foundation of both private and public autonomy, he simultaneously jettisons the thick metaphysical baggage that “dignity” implies and which has become deeply problematic under the conditions of modern pluralism.

The structure of Habermasian discourse theory provides a path to democratic legitimacy in the context of deep difference that is both consistent and non-metaphysical. In the next section, however, I will argue that problems emerge when we move from the idealized rational consensuses that provide the grounds of legitimacy to the actual rough and tumble of political life. Perhaps surprisingly, these problems emerge most acutely in Habermas’s own writings, particularly in his defense of the democratic role of civil disobedience.

3.1.2: *The tension*

¹² Jürgen Habermas, “On the Internal Relation between Law and Democracy,” trans. William Rehg, in *The Inclusion of the Other*, ed. Ciaran Cronin and Pablo De Greiff (Cambridge, Mass.: The MIT Press, 1998): p. 259.

¹³ *Ibid.*: pp. 260-261.

In September 1983, Habermas delivered an address before the Cultural Forum of the German Social Democratic Party concerning the recent decision by the Christian Democrat West German government to allow NATO to station nuclear missiles in the Federal Republic. The political substance of Habermas's address was fairly straightforward: he sympathized with opponents of the decision, who argued that the presence of tactical missiles on West German territory would make the country *more* rather than less vulnerable to a Soviet nuclear attack. The decision marked the FRG's acquiescence in a new and terrifying American strategy vis-à-vis the USSR, namely the attempt "to achieve the capability of winning a limited nuclear war—not, of course, in order to wage it, but rather to use this threat to dictate a situation in which war would be prevented only under the terms of a Pax Americana."¹⁴ The Helmut Kohl government, Habermas argued, was treading on dangerous new ground.

What made this address (later revised and published as an article in 1985) especially interesting from a theoretical perspective, however, was his reaction to the specific means of protest that the weapons' opponents were using—and which the West German government was excoriating as base criminality: civil disobedience. While the justification of particular acts of civil disobedience is always difficult to evaluate except in hindsight, as a political practice Habermas defended it as the "guardian of legitimacy," with "civil violations of rules" being "morally justified experiments without which a vital republic can retain neither its capacity for innovation nor its citizens' belief in its legitimacy."¹⁵ At the same time as he defends disobedients' against suggestions that they are common criminals, however, Habermas urges that civil disobedience must remain "suspended between legitimacy and legality":

¹⁴ Jürgen Habermas, "Civil Disobedience: Litmus Test for the Democratic Constitutional State," trans. John Torpey, *Berkeley Journal of Sociology* 30 (1985): p. 108.

¹⁵ *Ibid.*: p. 104.

If all personal risk is eliminated, the moral foundation of the illegal protest becomes questionable; its effectiveness as an appeal is damaged as well. Civil disobedience must remain suspended between legitimacy and legality; only then does it signal the fact that the democratic constitutional state with its legitimating constitutional principles reaches beyond their positive-legal embodiment.¹⁶

In the same way that civil disobedience remains in the gray area between facticity and validity, Habermas's own argument urges neither legalization nor "obdurate legalism" in the face of nonviolent resistance to laws.¹⁷

In many respects, civil disobedience can be seamlessly woven into Habermas's larger project, and at times its consistency with the theory of communicative action is foregrounded in the essay. In the first paragraph, he describes civil disobedience as an "unconventional means of influencing the formation of political will."¹⁸ In other words, even if civil disobedience departs from the traditional process of exchanging reasons in a practical discourse, it can nevertheless be understood as a part of the standard process of political will-formation. Similarly, while defending the anti-nuclear protestors from charges that they are insufficiently averse to violence, Habermas writes that "there is a conviction" among the disobedients "that acts of protest—even if they represent calculated infringements of rules—can have only a symbolic character and may be executed solely with the intention of appealing to the capacity for reason and sense of justice of the majority in each particular case."¹⁹ Reading these sentences by themselves, it can appear that civil disobedience is simply another type of reason-giving: an embodied argument, perhaps, but an argument nonetheless.

While Habermas naturally tries to make his account of civil disobedience consistent with discourse theory, however, cracks emerge later in the article. The gap becomes most apparent

¹⁶ Ibid.: p. 106.

¹⁷ Ibid.: p. 112.

¹⁸ Ibid.: p. 96.

¹⁹ Ibid.: p. 99.

when Habermas discusses the operability of the principle of majority rule in contemporary West Germany. The problem with majority rule in the case of stationing missiles in the Federal Republic was not only the argument of federal judge Helmut Simon that “‘the use of weapons of mass destruction, as previously in the case of slavery,’ must be made ‘an object of inalienable rights.’”²⁰ It was also the fact that “the confrontation of different life-forms [was] the matter at issue.”²¹ The dissent of the anti-nuclear protestors went beyond the usual boundaries of civilized opposition in a constitutional democracy:

The heterogeneous groups which have coalesced in this movement say not only a plebiscitary “no” to nuclear missiles. Instead, many “no’s” are aggregated in this movement... The dissensus which gains expression in this complex “no” aims not at this or that measure of policy; it is rooted in the rejection of a life-form—namely, that life-form which has been stylized as the normal prototype—which is tailored to the needs of a capitalist modernization process, programmed for possessive individualism, for values of material security, and for the strivings of competition and production, and which rests on the repression of both fear and the experience of death.²²

Under these conditions, “cultural traditions and collective identities *part ways* [emphasis original]” while “the principle of majority rule in questions of life and death nonetheless continues to hold sway,” a scenario that leads to “fractionation...that is, to a separatism which indicates that essential conditions for the functioning and validity of the principle of majority rule have been violated.”²³

Of particular interest here is Habermas’s use of the Wittgensteinian concept of “life-form” (*Lebensform*, more typically translated as “form of life”). The conditioning effect of forms of life on rational deliberation, after all, would later form the core of Chantal Mouffe’s critique of Habermasian deliberative democracy. For Mouffe, the incursion of forms of life into any act

²⁰ Ibid.: p. 110.

²¹ Ibid.

²² Ibid.

²³ Ibid.: pp. 110-111.

of deliberation will always prohibit it from getting off the ground: “For Wittgenstein to have agreement in opinions there must first be agreement on the language used and this, as he points out, implies agreement in forms of life...It is because they are inscribed in shared forms of life and agreements in judgments that procedures can be accepted and followed.”²⁴ No decision, no matter how deliberative, can be viewed as a moment of free-floating rationality freed from the substantive linguistic or cultural context in which it occurs. “Therefore, distinctions between ‘procedural’ and ‘substantial’ or between ‘moral’ and ‘ethical’ that are central to the Habermasian approach cannot be maintained and one must acknowledge that procedures always involve substantial ethical commitments.”²⁵ Here, without conceding that forms of life are ever so incommensurable that they eliminate the possibility of moral discourses altogether, Habermas at least acknowledges that they can be fractious enough to significantly impair the justifiability of the principle of majority rule.²⁶ In other words, the non-ideal procedure by which the discourse theory of law and democracy is meant to operate (majoritarian popular sovereignty) is severely limited in its applicability; under conditions of deep dissent, majority rule breaks down and there *must* be another means of achieving legitimacy. Habermas has little to say about this, other than that majority rule’s “value must be measured against the following standard: to what extent do the decisions, which the processes of majority rule make possible under conditions of

²⁴ Chantal Mouffe, “Deliberative Democracy or Agonistic Pluralism?” *Social Research* 66 (1999): p. 749.

²⁵ *Ibid.*

²⁶ And, in fact, Habermas had previously disputed the incommensurability hypothesis in a critique of Peter Winch’s study of the Azande people of Central Africa, writing that “Winch’s arguments are too weak to uphold the thesis that inherent to every linguistically articulated worldview and to every cultural form of life there is an incommensurable concept of rationality; but his strategy of argumentation is strong enough to set off the justified claim to universality on behalf of the rationality that gained expression in the modern understanding of the world from an uncritical self-interpretation of the modern world that is fixated on knowing and mastering external nature.” In other words, the clash of forms of life may not obviate the entire project of enlightenment rationality, but it certainly calls into question its omnipotence. Habermas, *TCA, Vol. 1*: p. 66.

limited resources of time and information, diverge from the ideal results of a discursively achieved agreement or a presumptively just compromise?”²⁷

In this story, civil disobedience and dissensus, not communicative action and consensus, is the critical process in the incomplete process of realizing the (incomplete) project of the constitution, as “the justification of civil disobedience relies on a *dynamic understanding* of the constitution as an unfinished project,” where “the task of interpreting and elaborating the system of rights poses itself *anew* for each generation. [Emphasis original.]”²⁸ Rather than the sort of stale, sanitizing force that Sheldon Wolin understands it to be, the constitution for Habermas “as the project of a just society...articulates the horizon of expectation opening on an ever-present future.”²⁹ This also recalls an earlier statement by Habermas on the concept of communicative power and its role in democratic politics:

Communicative power is exercised in the manner of a siege. It influences the premises of judgment and decision making in the political system without intending to conquer the system itself. It thus aims to assert its imperatives in the only language the besieged fortress understands: it takes responsibility for the pool of reasons that administrative power can handle instrumentally but cannot ignore, given its juridical structure.³⁰

In both of these passages, dissent—or even dissensus, in Rancire’s sense of *mésentente*, where politics entails the forcing of one “world” into another, with the tension between them forming the core of political subjectivation—drives legitimacy, and that legitimacy itself is always fleeting, receding over an ever-shifting horizon.

²⁷ Habermas, “Civil Disobedience”: p. 111. For reasons I outline in Chapter 2, Habermas’s own conception of compromise is, by his own admission, not up to the task of securing discursive legitimacy, as he sees it as structurally the same as bargaining—in other words, an instrumental rather than communicative process where parties to discourse are aiming to achieve their own particularistic interests and the “the discourse principle” can be “brought to bear only indirectly, namely, through procedures that *regulate* bargaining from the standpoint of fairness.” [Emphasis original.] Habermas, *BFN*: p. 166.

²⁸ Habermas, *BFN*: p. 384.

²⁹ *Ibid.*

³⁰ Jürgen Habermas, “Popular Sovereignty as Procedure,” in *BFN*: pp. 486-487.

This dimension of “no-saying” in Habermas, and particularly civil disobedience and the futurity toward which it is oriented, is at odds with the typical interpretation of discourse theory as a hegemonic “consensus machine.” In fact, there is a “protean moment of contestation in his onto-ethical groundwork that is *just as basic as the orientation to consensus*. [Emphasis original.]”³¹ At the same time, however, there is a clear tension between Habermas the theorist of dissensus and Habermas the champion of consensus. Rational consensus is the criterion of democratic legitimacy, but dissent is the driving force behind political change. Moreover, democratic legitimacy itself is deferred into an “ever-present future.”

3.2: Forst’s right to justification

Habermas’s own account of discourse theory leaves a tension to be resolved. Discourse theory, however, is not a static project, and Habermas’s own writing on the communicative paradigm is not the final word. “Like the early efforts of the Frankfurt School in the 1930s, he sees his own as contributing to the development of an interdisciplinary ‘paradigm’ of social and philosophical thought,” and by “adopting this terminology, Habermas consciously displaces critical attention away from the intentions of any individual social scientist or philosopher and onto the community of researchers who share a set of ontological, philosophical, and social scientific commitments and problems.”³² It makes sense, then, to interpose other extensions and alterations to the communicative paradigm between my analysis of Habermas and my presentation of compromise and dissent in the context of deliberative democracy. The most sophisticated recent account of that paradigm is offered by Rainer Forst. In this section, I will outline Forst’s main arguments, with particular emphasis on his explicit writings on deliberative democracy and how

³¹ Stephen K. White and Evan Robert Farr, “‘No-Saying’ in Habermas,” *Political Theory* 40 (2012): p. 37.

³² *Ibid.*: p. 52.

he differs from Habermas. I will then argue that Forst resolves Habermas's tension too strongly in the direction of predictability and closure instead of futurity and openness.

3.2.1: "The rule of reasons"

Forst grounds his account of deliberative democracy on his larger project, which proposes a "right to justification" as the firmest basis for a constructivist account of morality and justice. Justice, he argues, is ultimately a question of what "norms can claim general and reciprocal validity...in a general and reciprocal, discursive manner."³³ Like Habermas, he explicitly contrasts this account of justice with purely substantive theories: "The person who lacks certain goods should not be regarded as the primary victim of injustice but instead the one who does not 'count' when it comes to deciding about the process of producing and allocating goods."³⁴ This places him at odds with the Rawlsian project, and for reasons that are similar to Habermas. The idea of justice as a regime of principles that can be justified outside of actual discourses (with public reason and the overlapping consensus serving merely as sources of stability for a preconstituted conception of justice rather than justifications in their own right) is excessively monological; flesh-and-blood citizens become the objects of justice, rather than the subjects that they rightfully ought to be.

Unlike Habermas, however, he does not believe that the process of discursive justification can be a purely procedural one. Forst's version of discourse theory "does not rest on a 'neutral' foundation but on a moral principle of justification, that is, on the substantive

³³ Rainer Forst, *Justification and Critique: Towards a Critical Theory of Politics*, trans. Ciaran Cronin (Malden, Mass.: Polity Press, 2014): p. 3.

³⁴ *Ibid.*: p. 22.

individual moral right to justification.”³⁵ In other words, the communicative paradigm requires more than an “all affected” principle, where political legitimacy and moral justification is grounded in nothing more than the consensuses reached by all interested parties: “the criteria of reciprocal and general justification make it possible in cases of dissent (which are to be expected) to distinguish better from worse reasons; the criteria serve as a filter for claims and reasons that can be ‘reasonably rejected.’”³⁶ For Forst, the problem with Habermas’s discourse theory is not (as it is for the agonists) that its moral core is excessively hypostatized, but that it is insufficiently so.

This more robust foundationalism extends to Forst’s explicit account of deliberative democracy, which he describes as the “rule of reasons.” Like Habermas, Forst positions his version of democracy as a third alternative between liberalism (which is insufficiently cognizant of the discursive nature of justification) and communitarianism (which relies excessively on strong ethical attachments). Central to the rule of reasons is the idea of reciprocal and general justification in practical discourses: “since the norms that have to be justified by reasons will turn into *reciprocally* and *generally* binding and legally enforced norms [emphasis original],” only reciprocal and general arguments are acceptable forms of justification in political discourses.³⁷ Moreover, adhering to “the criteria of reciprocity and generality means to respect the *basic moral right to justification of every moral person*. [Emphasis original.]”³⁸ In other words, Forst follows Habermas in his contention that democratic legitimacy can be grounded only in practical discourses between citizens. He diverges from him, however, by erecting a weaker barrier between moral and political discourses: while Habermas recognized that democratic life entails

³⁵ Rainer Forst, *The Right to Justification: Elements of a Constructivist Theory of Justice*, trans. Jeffrey Flynn (New York: Columbia University Press, 2012): p. 5.

³⁶ *Ibid.*: pp. 5-6.

³⁷ *Ibid.*: p. 173.

³⁸ *Ibid.*: p. 177.

many different types of communication—including not only moral, but also ethical and pragmatic—Forst understands all democratic deliberation to be founded on a more universal moral right.

This continuity between moral and political philosophy leads Forst to argue that among the cultural background conditions for deliberative democracy to function is a shared sense of political justice and (by extension) morality, and one that is stronger than the Rawlsian overlapping consensus but weaker than the communitarian *Sittlichkeit*. Again, the sense of justice in the democratic community must be one that is rooted in the fundamental right of justification, or the “discursive responsibility to justify general norms by the criteria of reciprocity and generality...”³⁹ Extending from the responsibility of justification is the “willingness to take responsibility for the institutional and material realization of such forms of justification and for the consequences of decisions that have been reached.”⁴⁰ Deliberative democracy, then, has necessary antecedents that extend in two directions: a responsibility on the part of citizens to treat each other with a specific sense of moral respect in the deliberative setting and to comply with and contribute to the decisions that are made in a reciprocal and general discursive process.

At the same time as deliberative democracy requires a common societal sense of justice, however, Forst also emphasizes that the “rule of reasons” retains the same “anarchistic core” that Habermas insists “institutions of any democratic government must live off” of.⁴¹ Democratic politics is the most legitimate form of rule not because it results in any objectively right or good result, but because “its authority always remains within the realm of reasons among citizens.”⁴²

³⁹ Ibid.: p. 179.

⁴⁰ Ibid.

⁴¹ Habermas, *BFN*: p. xl.

⁴² Forst, *The Right to Justification*: p. 186.

Forst's deliberative democracy, like his larger project, is neither strictly procedural nor strictly substantive, a distinction that he finds problematic from the outset because his theory forms a foundation for "not only a conception of human rights, but also together with it a conception of *fundamental justice*."⁴³ Deliberative democracy is a system that is performative, with any evaluation of its consequences always redounding to citizens who are situated in the process itself, though it also entails *prima facie* rules of justification that condition deliberation.

Like Habermas, then, Forst is committed to a conception of democracy and human rights as co-original, as "both are based on the ultimate right to justification and entail political as well as moral autonomy...the latter being the normative core of the former."⁴⁴ The "ultimate ground" of justice is not a monological substantive set of principles that can be deduced in the mind of a philosopher sitting at his desk, but a dialogical process of justification that occurs between living people of flesh and blood. This aligns him more with radical democracy and the always-incomplete learning process that suggests than it does with Rawlsian liberalism. But how open and unconstrained are the consequences of Forst's "rule of reasons"?

3.2.2: *Shortcomings of deliberative democracy as the "rule of reasons"*

Despite its roots in practical discourses emerging from a robust public sphere, Forst's "rule of reasons" errs too strongly on the side of containing and sanitizing democratic politics for two reasons. First, its reliance on a shared sense of justice is ill-adapted to a communicative account of justice and democratic legitimacy. Second, its understanding of dissent as "reciprocal objection" is overly restrictive, writing a wide range of democratic practices out of the bounds of deliberation. In this section, I will explain both of these objections in turn.

⁴³ Ibid.: p. 6.

⁴⁴ Ibid.: p. 186.

As I mentioned above, Forst positions his project between liberalism—which he considers too elastic in its understanding of individuals’ cognitive and social capability to transcend their own political-cultural backgrounds—and communitarianism—which he considers too tight in the same regard. This extends to his adaptation of the Rawlsian notion of a “shared sense of justice” as a basic precondition for deliberative democracy: it must “rest on *shared moral* and not just *overlapping ethical* reasons [emphasis original],” but reasons that are short of the “much too strong notion of ‘constitutive community’” he associates with communitarian models of democracy.⁴⁵ He navigates this path between Scylla and Charybdis by arguing that “the basis of such a supportive culture...has to be a *shared sense of justice* that tells citizens what they owe to one another on moral grounds as members of their shared basic social structure [emphasis original],” which “entails various dimensions of *responsibility* [emphasis original].”⁴⁶

The responsibilities that Forst considers central to deliberative democracy, however, are overly restrictive, and they say too little about non-ideal circumstances of the sort that Habermas describes in “Civil Disobedience.” Interpreted weakly, reciprocity and generality may not be terribly problematic. On the surface, there is not much that is different from Habermas’s insistence on mutual perspective-taking, for instance: practical discourses in which reasons were applied inequitably are plainly undemocratic, and reciprocity and generality would likely be features of any fully legitimate deliberation—otherwise, the consequences could not be accepted by “all affected.” As guiding principles, they are in fact central to any communicative model of democracy.

⁴⁵ Ibid.: p. 178.

⁴⁶ Ibid.: p. 179.

The problems emerge, however, when the idealizations are lifted. While reciprocal and general *reasons* may be easy to identify from within a deliberative setting, reciprocal and general *consequences* are more complicated. Even if each participant in a discourse accepted their responsibilities as democratic citizens, it is not uncommon for disputes to arise over what fundamental ideas of fairness actually imply in practice. This type of dissent more closely resembles the “deep dissent” that I described in the first chapter of this dissertation, where a rupture exists between citizens’ basic self understandings as members of a democratic constitutional state.

Something like this occurred plainly during the Occupy protests of 2011: both the defenders of the status quo finance system in the United States and the Occupy activists were able to offer reciprocal and general reasons for their positions. Setting aside the likelihood of distorted communication, the system’s defenders could argue (as the conservative economist Gregory Mankiw recently did in an article forthcoming in *The Journal of Economic Perspectives*) that an efficient financial sector is necessary not only for the very wealthy who profit handsomely from it, but also for the allocation of credit to “job creators” and individual consumers who also benefit from the system in spite of persistent inequality.⁴⁷ Moreover, the large compensation packages they received were actually perfectly reasonable in light of finance’s central role in the economy: if *everyone* depends on capital, then it is justified that its skilled managers are among our most highly-paid citizens. As in Leibniz’s theodicy (or in Dr. Pangloss’s imagination) we live in the “best of all possible worlds.”

The Occupy protestors could respond with an indictment of the American financial system that relied on fundamentally different assumptions, but similarly was premised on

⁴⁷ N. Gregory Mankiw, “Defending the One Percent,” working paper, June 8, 2013 <http://scholar.harvard.edu/files/mankiw/files/defending_the_one_percent.pdf>.

reciprocal and general reasons. Even if one grants that an efficient banking sector is necessary for everyone's economic wellbeing, there is something that is basically and morally wrong about financial institutions being bailed out directly by the federal government while normal citizens were left to suffer the "friction" of the 2008-09 financial crisis. Moreover, large-scale inequality generates a democratic deficit, as the very wealthy and the corporations for which they work enjoy a much greater value of political liberty. Even if a "rising tide lifts all boats," inequality is also intrinsically destructive for both moral and ethical-political reasons.

While both sides of this dispute sometimes *did* resort to language that was neither reciprocal nor general (with the Occupy protestors cast as "losers," or the one-percenters referred to as "plutocrats"), there were also reasons available that were both. At the same time, however, it is *not* the case that either of their arguments was reciprocally or generally *non-rejectable*. In this scenario, it is difficult to envision what it would mean to say that citizens must have "the willingness to take responsibility for the institutional and material realization of such forms of justification and for the consequences of decisions that have been reached."⁴⁸ What is missing is an account of how legitimacy can be conceptualized "when the confrontation between different life-forms is the matter at issue."⁴⁹ In Habermas's understanding, the clash of forms of life weakens the principle of majority rule and is an indispensable component of democracy understood as a self-correcting (but never complete) learning process. In Forst's communicative model, there is much less space for democracy under non-ideal circumstances.

Forst understands that democratic deliberation is unlikely to be ideal under all circumstances, and equally importantly that disagreement—sometimes on a large and organized scale—is likely to persist even after deliberatively justified decisions have been made. This

⁴⁸ Forst, *The Right to Justification*: p. 179.

⁴⁹ Habermas, "Civil Disobedience": p. 110.

makes his explicit discussion of dissent, which he refers to as “reciprocal objection,” particularly relevant. He describes the process, which he characterizes as a basic cultural precondition for deliberative democracy along with a shared sense of justice, as follows:

As important as a broad and fair democratic input is, truly general participation will never be possible, and truly general agreement on political decisions will not be either on the output side. But what is necessary then is the general and unimpeded possibility of raising objections to decisions by pointing out that *reciprocally nonrejectable claims or reasons have been ignored*. . . Ideally, this kind of raising objections should already be part of the proper process of decision making, but given its constraints, this may not always be possible: thus, the need for additional checks that would require some institutional imaginativeness. [Emphasis added.]⁵⁰

While Forst deserves credit for building a model of *ex post* dissent into his account of deliberative democracy, however, the decision criterion of “reciprocally nonrejectable” arguments having “been ignored” is too limiting, as it inserts idealized assumptions into an ostensibly non-ideal component of his theory.

By assigning dissenters the responsibility of offering “reciprocally nonrejectable” reasons against a decision that has been reached, Forst is assuming too high a probability of an unproblematic sense of reciprocity. The Occupy example is instructive here: while the claims of both the defenders and the critics of American finance were reciprocally and generally relevant, none of them were reciprocally nonrejectable, and outside of the most grave injustices there will be very few such reasons that have been ignored in any given case of dissent. The communicative paradigm demands that in cases of contrasting forms of life the strong criteria of discourse theory must be relaxed, with the legitimacy of democratic decisions adjudicated according to how closely they approximate a “presumptively just compromise” rather than a

⁵⁰ Forst, *The Right to Justification*: p. 182.

rationally motivated consensus by all affected in a practical discourse. Forst does not leave space for this (highly likely) contingency.⁵¹

Even in its non-ideal guise, the “rule of reasons” does not account for scenarios in which the preconditions for ideal deliberative procedures are not present or only partially present. For that, an explicit model of imperfect democratic legitimacy is necessary.

3.3: Compromise and dissent in deliberative democracy

As I outlined in the last chapter, the centerpiece of compromise and dissent is the “next affected” or (N) principle. Like Habermas’s universalization, discourse, and democratic principles, (N) is the most basic criterion of legitimacy in compromise and dissent’s model of imperfect democratic legitimacy. It is premised on the recognition that the only legitimate type of political agreement under conditions of deep dissent is one that is understood by the parties themselves to be a provisional compromise. (N) provides the foundation of what type of provisionality is justified in political compromise, namely that *any political decision is only legitimate if it can be accepted by the next affected party*. As I will explain in this section, compromise and dissent’s reliance on a dialogical understanding of legitimacy naturally places it in league with deliberative democracy, and particularly with the discourse theoretical approach favored by Habermas and Forst. However, its emphasis on provisionality and futurity sets it apart from other versions of deliberation, placing it in closer concert with the agonistic and radical programs of Chantal Mouffe and Jacques Rancière.

Most importantly, compromise and dissent retains deliberative democracy’s core of affirmative legitimacy: even if there is no perfect justification of democratic decisions, there are more and less legitimate ones. Moreover, the legitimacy of any democratic decision is

⁵¹ Habermas, “Civil Disobedience”: p. 111.

communicative, with its justification hinging on practical discourses that are engaged in by actual citizens of the community in question: deliberation is not an *ex ante* process of providing stability and practical content to a conception of justice that could have been deduced monologically by a philosopher at his desk, but the process by which political justice is determined in the first instance. This, of course, places it closer to the Habermasian discourse theoretic paradigm than the Rawlsian liberal one.

Unlike other formulations of discourse theory, however, the criterion of legitimacy embodied in the (N) principle is dynamic, whereas the criteria of the democratic principle and the right to justification are static. Rather than a rationally motivated consensus that can be identified in the status quo, (N) relies on an attitude of inclusion that projects into the future. Because legitimacy turns on how parties to deliberation will respond to the *next* affected citizen, there is no way to finally adjudicate the legitimacy of a law, policy, or other system of rules without waiting to see the way new instances of dissent are treated. The inclusiveness of the discourse in the present is a means of determining legitimacy relative to more exclusive agreements, but that legitimacy remains merely relative pending the inclusion of future dissenters. In the same way that closure is deferred into the future, legitimacy is deferred as well.

Similarly, under compromise and dissent there is no conception of perfect legitimacy or justification against which actual decisions are measured. Even as an idealization, the (N) principle renders moot the idea of a finally just democratic social order. This is because the process of “next affecteds” dissenting is constant: not only do individual citizens newly adopt a dissenting perspective every day, but individual citizens also are constantly *becoming affected* by the status quo. Even if we were to follow Rawls and imagine an ideal society in which there is no immigration, disability, or ethnic or religious strife, it is incoherent to imagine a society in which

there is no birth, death, or even aging. To do so would be to abandon political theory as a study of *human* interaction, no matter how satisfying the resultant idealizations may be.

This, then, is another departure from traditional models of deliberative democracy: compromise and dissent closes the gap between ideal and non-ideal theory. The (N) principle entails a recognition that democratic theory must abandon perfectionist criteria of full justification if it is to remain democratic. Not only is it an impossibility as long as new citizens with new interests and self-understandings emerge, but it is also disrespectful of the fact that democratic deliberation occurs between actual people rather than imaginary ones. As long as politics involves real men and women, democratic legitimacy can only ever be imperfect.

Despite its rejection of ideal democratic procedures, the future-orientation shares a strong affinity with Habermas, and particularly the more radical Habermas described above in section 3.1.2. Like him, I understand democracy to be process that is never complete, and that must continue to evolve in light of changing circumstances. Those who engage in civil disobedience, he writes, have a “dynamic understanding of the constitution as an unfinished project.”⁵² He goes on:

From this long-term perspective, the constitutional state does not represent a finished structure but a delicate and sensitive—above all fallible and revisable—enterprise, whose purpose is to realize the system of rights *anew* in changing circumstances, that is, to interpret the system of rights better, to institutionalize it more appropriately, and to draw out its contents more radically. [Emphasis original.]⁵³

Compromise and dissent makes good on the perpetual incompleteness of democratic legitimacy and the democratic state in general by placing that very precariousness into the foundation of its criterion of justification: we need something like the (N) principle *because* democracy opens onto an uncertain horizon, and that uncertainty is something we neither can nor should wish

⁵² Habermas, *BFN*: p. 384.

⁵³ *Ibid.*

away. The unpredictability of the political, as the agonists remind us, is not only an inevitability; it is also the basis on which democracy is a regime of human freedom, always open to expressions of the new.

In this way, compromise and dissent resolves Habermas's tension without sacrificing the "anarchistic core" of the communicative paradigm. It resolves the tension of a normative model of democracy that simultaneously relies on consensus and dissensus by building the unpredictability of democracy into its criterion of legitimacy. The (N) principle provides a blueprint for the adjudication of points of democratic closure, but *final* closure is perpetually deferred into the future. This accounts not only for the normative substance of discourse theory, but also for the problems that emerge from the reality of deep dissent, or (in Habermas's language) the confrontation of forms of life. While a basic tension exists between Habermas's insistence on "all affected" approving of any legitimate norm and his assignment of post-deliberation resistance as the "guardian of legitimacy," no such contradiction inheres in the version of the communicative paradigm embodied by compromise and dissent.

This contrasts sharply with the approach of Rainer Forst described above. Rather than embrace the democratic resource that deep dissent provides, he closes it off by insisting on an idealization that relies on a strong, fixed, and shared sense of justice among interlocutors. While compromise and dissent can encompass a wide range of dissensual forms, the "rule of reasons" permits only those that refer to an already settled understanding of fairness, described by Forst as reciprocity and generality. By turning on the (N) principle rather than a prepolitical right to justification, compromise and dissent acknowledges that the meanings of fairness, reciprocity, generality, and even of justification are precisely the *objects* of democratic contestation. While

those principles of argumentation may be justified in a weak form, they are not determinate enough to stand in for the inevitable deep dissent over their substantive content.

* * *

In this chapter, I explained compromise and dissent's consistencies with and departures from the deliberative democratic paradigm. In the end, compromise and dissent remains closely aligned with the deliberative project: it includes a strong (if always incomplete) account of democratic legitimacy and bases that account on practical discourses between democratic citizens. In some senses, my model of imperfect legitimacy is *more* deliberative than the most sophisticated recent revision of Habermas's discourse theory of law and democracy, offered by Rainer Forst: the legitimacy achieved by satisfying the conditions of the (N) principle leaves a greater share of political decision-making to the actual rough-and-tumble of democratic politics, as the prepolitical rules of discourse are weaker than they are in the "rule of reasons."

At the same time, however, compromise and dissent's emphasis on futurity and uncertainty places it more closely in league with the most prominent rivals of the deliberative paradigm, namely agonistic and radical democratic theory. In the next chapter I will compare my project with the more fundamental critiques of deliberative democracy offered by exponents of those research programs.

Chapter 4: Dissensus and dissent: compromise and agonistic democracy

Since the publication of Jürgen Habermas's *Between Facts and Norms* and John Rawls's *Political Liberalism*, the paradigm of deliberative democracy has been one of the most influential streams of political thought, but at the same time has attracted some of the most vehement backlashes.

In large measure, the difference between the deliberativists or discursivists (to make an ad hoc distinction between theorists in the Rawlsian and Habermasian traditions, respectively) and the proponents of what I will broadly categorize as agonistic democracy springs from two sets of arguments that both have strong intuitive appeal. On one side, the deliberativists and discursivists are driven by a strong sense that it is the responsibility of democracy to promote and secure *justice*—however flawed it inherently is. This is captured, for instance, in a representative passage from Rainer Forst: “Democracy is the only appropriate, though never fully appropriate political expression of the basic right to justification and of mutual respect between persons.”¹ While the democratic process may be inherently imperfect, it is nevertheless the only means of legitimacy in what Habermas calls “post-traditional” society, where “integrating worldviews and collectively binding comprehensive doctrines have in any case disintegrated.”²

On the other side, agonistic and radical democrats make claims on a somewhat different level, charging that the deliberativists' belief in the possibility of justification is unfounded. According to this understanding, any model that relies on the idea that validity can be secured through rational deliberation is hopelessly naïve. In fact, the best that can be hoped for

¹ Rainer Forst, “The Rule of Reasons: Three Models of Deliberative Democracy,” *Ratio Juris* 14 (2001): 374.

² Jürgen Habermas, “On the Internal Relation between Law and Democracy,” in *The Inclusion of the Other*, eds. Ciaran Cronin and Pablo De Greiff (Cambridge, Mass.: The MIT Press, 1998): 255-256.

democracy is permanent disagreement and uncertainty. To expect reasoned consensus—however thin or rare—will only reify the very inequities of power that democracy means to combat. This conception of democracy, which Sheldon Wolin has described as “fugitive,”³ is exemplified in a passage by Claude Lefort:

In my view, the important point is that democracy is instituted and sustained by the *dissolution of markers of certainty*. It inaugurates a history in which people experience a fundamental indeterminacy as to the basis of power, law and knowledge, and as to the basis of relations between *self* and *other*, at every level of social life...⁴

Democracy is not a set of procedural norms for securing justice, but a condition that is fraught with missteps, shot through with power, and all too often beset by tragedy.

In this chapter, I will argue that it is possible to reconcile the agonistic and deliberative research programs through the procedure of political compromise. In the first section I will outline some of the more trenchant critiques of deliberative democracy offered by agonistic and radical democrats. While I am sympathetic with Habermasian deliberative democracy, the critiques described here pose problems for discourse theory that are not satisfactorily addressed within discourse theory itself. Despite the power of the agonistic and radical critiques, in the second section I will argue that agonistic democracy is nevertheless incomplete. While their observations are incisive, the agonists ultimately fail to offer an affirmative framework that I believe is a necessary supplement to critical theory. Finally, in the third section I will argue that viewing democratic decisions as provisional compromises captures both the optimistic appeal of deliberation and the tragic logic of agonism.

³ Sheldon S. Wolin, “Fugitive Democracy,” in *Democracy and Difference: Contesting the Boundaries of the Political*, ed. Seyla Benhabib (Princeton, NJ: Princeton University Press, 1996): 31-45.

⁴ Claude Lefort, *Democracy and Political Theory*, trans. David Macey (Cambridge, UK: Polity Press, 1988): 19.

4.1: Power of the agonistic critique

While my project is, at a broad level, a project of deliberative democratic theory, I believe it is necessary to acknowledge that the agonistic and radical critiques of deliberation are powerful and, in many respects, persuasive. While the cottage industry created by critics of Habermas's putative devotion to consensus and the "ideal speech situation" is rife with overstatement, the broader critique is difficult to dodge: is there something Pollyannaish—and perniciously authoritarian—in the deliberative conception of public autonomy?

This section will briefly outline some of the more influential agonistic critiques of deliberative democracy, with particular emphasis on the oppressive potential of consensus-oriented deliberation and the problem of subjectless communication. I will conclude by synthesizing the various critiques of deliberation into a single, simpler form that I believe captures the intuitive appeal of the radical attack on deliberation: deliberative democracy is overly attached to stability, normalization, and, most importantly, closure.

4.1.1: Oppressive potential of consensus

In the preface to *Identity\Difference*, William E. Connolly writes that "Agonistic democracy breaks with the democratic idealism of communitarianism through its refusal to equate concern for human dignity with a quest for rational consensus." While Connolly calls the trend of consensus-seeking "communitarianism," it is clear that his real target is the deliberative democrats who, at the time of *Identity\Difference*'s publication in 1991, had already secured their place as the dominant paradigm-setters in the field of democratic theory. He goes on to describe agonistic democracy further:

It opens political spaces for agonistic relations of adversarial respect. Democratic agonism does not exhaust social space; it leaves room for other modalities of

attachment and detachment. But it does disrupt consensual ideals of political engagement and aspiration. It insists that one significant way to support human dignity is to cultivate agonistic respect between interlocking and contending constituencies.⁵

While Connolly's general target is consensus, however, he and other agonists are more specifically arguing against a particular kind of consensus, and the characteristics of consensus they see in the deliberative model. The key modifier that heightens consensus's oppressive potential is "rational."

The problem with consensus for the agonist is not the mere fact of agreement, but the way in which its ostensible rationalism and universality elides difference and the constitutive conflict of democratic politics. Chantal Mouffe, another of the most influential agonistic democrats, writes as much explicitly in "Deliberative Democracy or Agonistic Pluralism?":

To be sure, pluralist democracy demands a certain amount of consensus, but such a consensus concerns only some ethico-political principles. Since those ethico-political principles can only exist, however, through many different and conflicting interpretations, such a consensus is bound to be a "conflictual consensus." This is why a pluralist democracy needs to make room for dissent and for the institutions through which it can be manifested.⁶

The mistake of the deliberative democrat is not so much the commitment to deliberation or consensus *qua* deliberation or consensus, but the sense in which she presumes that deliberation can exist as a free-floating, uncoerced practice that consistently secures procedurally just outcomes. To borrow language from Habermas's critique of Rawls, this presumption loses its force when we move from the "fictional citizens of a just society" to "real citizens of flesh and blood."⁷ When real citizens reach real consensus, the process—and by extension the result—

⁵ William E. Connolly, *Identity/Difference: Democratic Negotiations of Political Paradox, Expanded Edition* (Minneapolis, Minn.: University of Minnesota Press, 1991): p. x.

⁶ Chantal Mouffe, "Deliberative Democracy or Agonistic Pluralism?" *Social Research* 66 (1999): p. 756.

⁷ Jürgen Habermas, "Reconciliation through the Public Use of Reason," in *The Inclusion of the Other: Studies in Political Theory*, ed. Ciaran Cronin and Pablo De Greiff (Cambridge, Mass.: The MIT Press, 1998): p. 61.

are marked by the antecedent conditions of power, identity, and difference that framed the discourse in the first place.

Agonists make this argument in a variety of ways. Mouffe, drawing on Jacques Lacan and Slavoj Žižek, writes that Habermas's "ideal speech situation" neglects the "master signifier, the signifier of symbolic authority founded only on itself"; according to this argument, speech makes no sense in the first place without the meaning that is bestowed by transcendental authority, and so attempting to "subtract from a discursive field its distortion" would only mean that "the field would disintegrate, 'de-quilt.'"⁸ In Habermasian terms, authority can never be communicatively justified because the process of discursive legitimation itself depends on a prior authority that constrains communication. Paradoxically, the unforced force of the better argument depends on coercion for its very meaning.

Deliberative democracy's (and specifically Habermas's) putative devotion to an ideal type of consensus is mostly overstated. Habermas—and, by extension, deliberative democracy—have much more room for "no-saying" than his critics typically acknowledge. When his arguments about civil disobedience—which he calls the "litmus test of the democratic constitutional state"—are brought into the picture, the democratic public sphere comes into view as a space marked as much by dissensus and conflict as consensus and rational deliberation. However, even if it is the case that aesthetic-expressive and dissensual forms of speech fit into the interstices of Habermas's theory of democracy—which I believe his account of civil disobedience proves to be the case—his critics are correct in detecting a problem with his version of deliberation. However, it is the *kind* of consensus he urges rather than consensus itself that is the real problem.

⁸ Mouffe, p. 751.

4.1.2: *Subjectless communication and publicity*

In *Between Facts and Norms*, Habermas departs from what he calls the “classical views” of communication and parliamentary democracy.⁹ He “gives up the philosophy of the subject,” meaning that “the ‘self’ of the self-organizing legal community disappears in the subjectless forms of communication that regulate the flow of discursive opinion- and will-formation in such a way that their fallible results enjoy the presumption of being reasonable.”¹⁰ It is the subjectless character of communication that results in democracy being what Habermas calls “decentered,” where communicative power becomes anonymous and free-floating rather than connected to specific groups of individuals debating and pressing for their interests. His reasons for reinterpreting popular sovereignty as subjectless has to do with the status of the discourse theoretic model as an alternative to both liberalism and republicanism. Since Jean Bodin and Jean-Jacques Rousseau, he argues, republican thinkers have interpreted legitimacy as a scenario in which “the people, who are at least partially present, are the bearers of a sovereignty that in principle cannot be delegated,” and where as sovereigns “the people cannot have others represent them.”¹¹ This is premised, Habermas argues, on a spurious ontology of sovereignty and the state, “where the whole is constituted either by a sovereign citizenry or by its constitution.”¹² Connecting popular sovereignty to this sort of strong foundationalism is both unrealistic and anachronistic in a post-conventional age.

While Habermas emphasizes that he does not wish “to denounce the intuition connected with the idea of popular sovereignty but to interpret it intersubjectively,” however, the loosening connection in his work—and, by extension, in deliberative democracy in general—between

⁹ Jürgen Habermas, *Between Facts and Norms: Contributions to a Discourse Theory of Law and Democracy*, trans. William Rehg (Cambridge, Mass.: The MIT Press, 1996): p. 185.

¹⁰ *Ibid.*: p. 301.

¹¹ *Ibid.*

¹² *Ibid.*

discourse in the abstract and the individuals and (especially) interests who are engaging in discourse has raised hackles with his critics on the left.¹³ Removing the subject from discourse not only is disrespectful of the reality of deep pluralism, they charge, but also is ignorant of the ineradicable role of power in constituting political practices. In short, removing the subject from democratic deliberation both obfuscates difference and is overly optimistic about deliberative democracy's ability to secure legitimate results.

The intrinsic interests that are embedded in language forms the core of Mouffe's Wittgensteinian critique of deliberative democracy offered in "Deliberative Democracy or Agonistic Pluralism?" Rational deliberation that is divorced from the cultural and linguistic setting in which it takes place is not possible because speech requires a stable order of meaning to anchor it; without this order, it is infinitely regressive. Referring to Ludwig Wittgenstein, she writes,

For him agreement is established not on significations (*Meinungen*) but on a form of life (*Lebensform*). It is, as has been pointed out, an *Einstimmung* fusion of voices made possible by a common form of life, not *Einverständnis* product of reason—like in Habermas. Such an approach requires reintroducing into the process of deliberation the whole rhetorical dimension that the Habermasian discourse perspective is precisely at pains to eliminate.¹⁴

Much like Hegel in his famous critique of Kantian ethics—which only works satisfactorily “if we already had determinate principles concerning how to act”—Mouffe charges Habermas and the deliberativists with draining the substance from democratic politics.¹⁵ Practicing democracy can no more be subjectless than speaking, writing a dissertation, or playing basketball. And most perniciously, attempting to remove subjectivity and *Lebensform*—the democratic *Sittlichkeit*—leaves the democratic theorist without the necessary resources to critique the creeping influence

¹³ Ibid.

¹⁴ Mouffe, “Deliberative Democracy or Agonistic Pluralism?": p. 749.

¹⁵ G.W.F. Hegel, *Elements of the Philosophy of Right*, ed. Allen W. Wood, trans. H.B. Nisbet (Cambridge, U.K.: Cambridge University Press, 1991): p. 163.

of illegitimate power in politics—whether it takes the form of Habermasian lifeworld colonization or more diffuse systems of patriarchy or white supremacy.

Nancy Fraser makes a similar argument in “Rethinking the Public Sphere.” Although the article was originally a response to *The Structural Transformation of the Public Sphere* rather than Habermas’s more recent, explicitly political writings, her warning against “putting any strictures on what sorts of topics, interests, and views are admissible in deliberation” applies as well to *BFN* or *TCA* as it does Habermas’s earlier works.¹⁶ According to Fraser, if we are to take democracy seriously we must acknowledge that restrictions on the substance of deliberation are antithetical to the enterprise itself. “In general,” she writes, “critical theory needs to take a harder, more critical look at the terms ‘private’ and ‘public.’ These terms, after all, are not simply straightforward designations of societal spheres; they are cultural classifications and rhetorical labels. In political discourse, they are powerful terms that are frequently deployed to delegitimize some interests, views, and topics and to valorize others.”¹⁷ By placing certain interests outside the bounds of acceptable discourse, there is too great a risk that those discourses will merely recapitulate the interests of the most powerful—a risk that has been reality, Fraser points out, in struggles to bring issues like marital rape and domestic violence from the “private” to the “public” sphere.

For Habermasian deliberation to take democracy seriously, it must develop resources to consistently bring discussions of ostensibly private interests into public discourses. At the same time, it must do this in a way that does not simply define the subject of democracy as irreducibly particular goals of individuals and groups. As I will explain below, I believe that compromise and dissent is capable of navigating this space. By centering a model of democracy on the

¹⁶ Nancy Fraser, “Rethinking the Public Sphere: A Contribution to the Critique of Actually Existing Democracy,” *Social Text* 25/26 (1990): p. 72.

¹⁷ *Ibid.*: p. 73.

plasticity of what it means to be “affected” by a law—formulated as a revised version of Habermas’s discourse principle that I call the “next affected principle”—we can both avoid the problematic assumption that democratic communities are simple universal “we”s while at the same time retaining an affirmative concept of legitimacy.

4.1.3: Stability and closure

In *Democracy and Political Theory*, Claude Lefort offered a widely influential description of the “essence” of democracy as the “dissolution of the markers of certainty.”¹⁸ Rather than a rationalistic project of discovering legitimate laws and procedures, Lefort sees democracy as something that can never be stabilized into a form of government that guarantees just outcomes and fair institutions. If these things were to be guaranteed, then it would no longer be democracy at all: rather than a path to legitimation, it would be an attempt at sanitization, and one that neglects the wild (or, in Habermas’s own words, “anarchistic”) nature of democratic life.¹⁹

Agonistic and radical democrats have taken aim at this tendency in the work of deliberative democrats, with particular focus on the role of constitutionalism in deliberation. In “Norm and Form: The Constitutionalizing of Democracy,” Sheldon Wolin argues that the fusion of democracy and constitutionalism was by no means natural or inevitable, and that in fact constitutions—both in theory and practice—serve to normalize the radical contingency at the heart of democracy. “Constitutional Democracy,” he writes, “is not a seamless web of two complementary notions but an ideological construction designed not to realize democracy but to

¹⁸ Claude Lefort, *Democracy and Political Theory*, trans. David Macey (Cambridge, U.K.: Polity Press, 1988): p. 19.

¹⁹ Habermas, *BFN*: p. xl.

reconstitute it and, as a consequence, repress it.”²⁰ The problem with constitutionalism and democracy’s troubled marriage, according to Wolin, is that it is at once too expansive (as it “tends to produce internal hierarchies, to restrict experience, and to inject an esoteric dimension into politics”) and too narrow (envisioning “politics as organizational activity aimed at a single, dominating objective, control of the state apparatus”).²¹ In short, the constitution enforces artificial boundaries around the ostensibly boundless project of democracy: by defining democracy strictly as a form of government and attempting to make it tame and predictable, constitutionalists lose sight of the wildness that ought to define popular sovereignty.

In many respects, Habermas is more closely aligned with this view than he is often given credit for. The role of civil disobedience in *Between Facts and Norms* and other works invites a reading of Habermas that is agonistic and driven as much by disagreement as it is by consensus. “While Habermas argues that the constitution must be upheld as a project, and that this project must command the loyalty of democratic citizens, it is by no means a cramped undertaking, restricted only to narrow, discursive practices.”²² Rather—as becomes clear in his discussion of the role of civil disobedience in democratic politics—Habermas views the constitution as “a delicate and sensitive—above all fallible and revisable—enterprise, whose purpose is to realize the system of rights anew in changing circumstances, that is, to interpret the system of rights better, to institutionalize it more appropriately, and to draw out its contents more radically.”²³ In our reading, “this suggests that each reinterpretation and revision of the democratic constitution is always experimental in character,” and that the constitution itself is “a dialogical political

²⁰ Sheldon Wolin, “Norm and Form: The Constitutionalizing of Democracy,” in *Athenian Political Thought and the Reconstruction of American Democracy*, eds. J. Peter Euben, John Wallach, and Josiah Ober (Ithaca, N.Y.: Cornell University Press, 1994): p. 32.

²¹ Wolin: pp. 36, 39.

²² Stephen K. White and Evan Robert Farr, “No-Saying in Habermas,” *Political Theory* 40 (2012): p. 48.

²³ Habermas, *BFN*: p. 384. Cited in White and Farr: p. 48.

project that is continually unfolding in ways that cannot legitimately be domesticated in advance.”²⁴

As we also note in that article, however, this reading can only be taken so far: while we argued that Habermas’s orientation toward futurity and emphasis on the civil disobedient’s “no” presents a neglected agonistic strain in his writing, we nevertheless acknowledge that “no-saying...has been left largely in the background by Habermas, compared to his extensive elaborations of the orientation to consensus—yes-saying—in linguistic interaction.”²⁵ Rather than making the untenable claim that no-saying is at the center of Habermas’s thought, we simply argue that the position we identify is a shift of emphasis that is consistent with the discourse theory paradigm. Here, I attempt to do the same: if it is successful, compromise and dissent will be a more defensible articulation of Habermas’s communicative paradigm, and one that borrows elements from both discourse theory and agonism while discarding others. I have already explained where I depart from discourse theory/deliberative democracy. In the next section I will explain my departures from agonistic democratic theory.

4.2: Problems with the agonistic paradigm

While the agonistic paradigm offers a powerful critique of both deliberative and actually existing democracy, in this section I will argue that its neglect of the affirmative dimensions of democracy is a fatal flaw, preventing it from accounting for much of what makes democracy distinctive.

4.2.1: Lack of positive framework

²⁴ White and Farr: pp. 48, 49.

²⁵ White and Farr: p.

Agonism works by inverting the goals and expectations of deliberative democracy: instead of envisioning a grand consensus where the rules of discourse and political legitimacy have finally been achieved, agonists argue that consensus is conceptually impossible, and that the highest virtue of democracy is its unique ability to provision space for the agon—not agreement—to express itself. This inversion, however, creates some problems for the agonistic “model”²⁶ that I will now explore. The first is fairly straightforward, and has been leveled against theorists like Mouffe and Connolly in the past: by casting democracy as a perpetual conflict between competing identities,²⁷ agonistic democracy loses much of the positive potential that other theories of democracy attempt to capture. For agonistic and radical democrats, uncertainty is not only understood as an inevitable condition of any democracy, but as an end in itself. For Connolly, democracy is good largely *because* it “accentuates exposure to contingency.”²⁸ For Mouffe, democracy’s virtue lies on little more than “pragmatic grounds,” arguing that “if we accept that relations of power are constitutive of the social, then the main question of democratic politics is not how to eliminate power but how to constitute forms of power that are compatible with democratic values.”²⁹ While this conceptualization of contingency is done in the spirit of critique, it also lacks an affirmative characterization of what those values are.

Arguing that affirmative changes are necessary as a matter of justice is awkward for agonists *because* they self-consciously eschew an affirmative legitimating framework.³⁰ As I

²⁶ While I occasionally apply words like “model” or “system” to agonistic democratic theory, I am aware that they aren’t a particularly tidy fit. I’ll nevertheless continue using them, because it would be awkward to counterpoise the deliberative “system” with the agonistic “disjunction,” or “paradox,” or whatever other word might best describe the body of theory.

²⁷ Because even with the “pathos of distance,” the relation between identities is still presented as an adversarial one.

²⁸ Connolly: p. 193.

²⁹ Mouffe: p. 753.

³⁰ As I will acknowledge in the next section, it is problematic to group Mouffe and Connolly *too* closely together here. A significant part of Connolly’s project is the articulation of a positive—though nonfoundationalist—account of ethical life premised on the “Pathos of Distance.” This type of affirmative political theory is mostly

noted above, this lack is not something that could easily be grafted on to extant theories of agonistic democracy. Indeed, the elusiveness of any true legitimacy is understood as *constitutive* of the political itself. Because it is impossible to avoid the influence of power and irreconcilable differences, there is no such thing as a purely fair or impartial democratic procedure. This leaves some major holes in the agonistic system. If there is no way of adjudicating the legitimacy of the procedure or substance of democratic practices, then it seems unlikely that democracy can fulfill even the pragmatic function that a theorist like Chantal Mouffe assigns to it. To be sure, the agonists are correct in noting that democratic politics *always* entails coercion and power, but what is the difference between forms of coercion that are justified and those that are not?

4.2.2: Indeterminacy

Bringing on board both the justificatory framework of deliberative democracy and the fugitive, radically decentered understanding of agonistic or radical democracy is by no means an easy task. In fact, the two are frequently posed as polar opposites, with incommensurable meanings of the word “democracy” itself. In the introduction to her book *Emergency Politics*, Bonnie Honig makes the claim succinctly. She writes that “the paradox of politics”—Rousseau’s familiar discovery that good law requires good citizens, but that good citizens also paradoxically require good law—“does not elicit from us justification or confront us with the need for legitimation” and “is not soluble by law or legal institutions, nor can it be tamed by universal or cosmopolitan norms.” Rather, she writes, “the paradox teaches us the limits of law and calls us to responsibility for it. And it teaches that the stories of politics have no ending, they are never

absent in Mouffe’s work. Nevertheless, though they differ in their emphases on the significance of affirmation on the micro-level of ethos, they agree in their rejection of a *macro*-level account of democratic legitimation. Though there are important differences in their understandings of agonism, they agree on the most important point for my purposes in this chapter.

ending.”³¹ For Honig, democratic theorists who attempt to normalize democracy as a system of government that yields legitimate rule are basically making a category mistake: this attempt fails to comprehend the deeply fraught nature of politics, and the irresolvable problems that it necessarily entails.

However, while her critique of deliberative democrats is powerful, it is far from conclusive. What does it mean to take “responsibility for” the paradox of politics? Is deliberative democrats’ problem their putative attempt to solve the problem of democratic rule “once and for all” (in Rawls’s words) or to assign to it a teleological progress, or the mere fact that they propose an affirmative conception of political association? If it is the last, what are the grounds for criticizing status quo relations of power or material distributions? And if it is the first (as I believe it is) how might a democratic theorist turn agonism into a democracy worth defending?

Despite agonistic and radical democrats’ protestations to the contrary, I don’t believe there is anything intrinsically incommensurable between a politics of deep pluralism/pluralization and a politics of legitimation. There is, however, an important shift that must be made in order to make them consistent. *Namely, the very contingency that agonists have identified with democracy must be made a part of the legitimating framework itself.* With this turn, most of the harshest critiques of deliberative democracy—that it reifies existing power structures, that its claims to legitimacy are exaggerated, and especially that it is too focused on political closure—can be avoided while at the same time keeping its affirmative orientation. When stability, progress, and consensus are replaced with contingency, uncertainty, and (at least conditional) dissensus, “democratic legitimation” loses its hegemonic ring.

³¹ Bonnie Honig, *Emergency Politics: Paradox, Law, Democracy* (Princeton, NJ: Princeton University Press, 2009): p. 3.

As the title of my dissertation suggests, I believe this shift can be accomplished by injecting a robust understanding of political compromise into democratic theory. Rather than the simplistic “difference-splitting” that is too often associated with it, I believe compromise understood in the right way can yield democratic theory that is positive (in the sense of exceeding mere critique) while at the same time retaining its radical potential. The caveat that requires explanation, of course, is how to understand compromise in the right way.

4.3: Compromise and dissent as a third alternative

In the preface to the expanded edition of *Identity\Difference*, William E. Connolly writes that “to embrace publicly a nontheistic source of ethical inspiration without claiming universality for it”—the stated aim of his political theory—“is to bind ethico-political life to negotiations and settlements between chastened partisans more than to common confession of a universal faith or a consensus forged by the putative power of the better argument.”³² This is not out of step with the language in the rest of the book; its subtitle, *Democratic Negotiations of Political Paradox*, echoes the language of compromise and provisionality found in his call for “negotiations and settlements” rather than universality and consensus.

But can the idea of “democratic negotiation” extend beyond the individual-level “agonistic respect” and “critical responsiveness” that Connolly urges? It may be unlikely that I would ever be able to convince him that compromise and dissent can encapsulate both agonism and a theory of legitimacy; to be truly respectful of pluralism in Connolly’s agonism is to be attuned to pluralization. Respect for difference is respect for becoming rather than static being, and a “politics of becoming” occurs when “a new constituency or event surges into being from

³² Connolly, *Identity\Difference*: p. xxi.

below the threshold of tolerance, justice, or legitimacy.”³³ In this understanding, democratic life is too messy to be constrained by a theory of full legitimacy, as new identities, interests, and movements will continually crop up “below the threshold” of justification.

Nevertheless, in this section I will rephrase compromise and dissent as supplements to the agonistic paradigm. This can be illustrated in three ways. In the first subsection, I will explain how political compromise—and the (N) principle in particular—not only embraces democratic impermanence, but the specific type of impermanence that agonists place at the heart of democracy. By transmuting Habermas’s familiar “all affected” principle into a “next affected principle,” we can effect not only a normative but also an ontological shift in the deliberative theory of democratic legitimation. Like Mouffe, I recognize that every democratic decision requires the moment(s) of closure, but I also leave open contestation about that closure’s final status. In the second subsection, I discuss the role of alternative forms of communication in political compromise, eschewing the putatively hyper-rationalist orientation of deliberative democracy. In the third and final section, I explain how compromise and dissent can capture features of agonistic democracy while salvaging the affirmative potential of deliberative democracy.

4.3.1: Provisionality and uncertainty

(1) The first and most important modification that I make to the deliberative model of democratic legitimacy is a robust incorporation of provisionality. Earlier in the dissertation, I made this explicit with my discussion of the “next affected” or (N) principle, adapted from Habermas’s democratic principle:

³³ Connolly, *Identity\Difference*: pp. xxviii-xxix.

(N): Only those rules can claim to be valid that meet (or could meet) with the approval of the next affected in their capacity as participants in a practical discourse.

On one level, this simply adds a temporal dimension to Habermas's democratic principle that may have already been implicit. The prohibition on unchangeable laws dates to the early modern period of political theory, as famously distilled in Thomas Jefferson's September 6, 1789, letter to James Madison, in which he argues that "the earth belongs always to the living generation," and consequently that "no society can make a perpetual constitution, or even a perpetual law."³⁴

At the same time, however, the (N) principle shifts the normative emphasis of deliberative democracy in a more fundamental way. While the idea that democratic decisions can only ever claim "imperfect legitimacy" (in Jane Mansbridge's language) is widely recognized in democratic theory, the next affected principle goes a step further.³⁵ If an objection by the *next* affected party renders the original democratic decision no longer legitimate, then a stable conception of legitimacy becomes ontologically infeasible even as a regulative ideal. Even if we imagine with Rawls a society with a stable conception of justice and no incursions from pesky "non-ideal" types (new immigrants, disabled persons, etc.), the simple fact that any society exists in time will make hash of any ideal democratic procedure. Unless we assume away birth and death, legitimacy will be compromised—or, more optimistically, encounter new challenges—at literally every moment. Much like Rawls's observation that the circumstances of justice counsel against hypothesizing an "association of saints agreeing on a common ideal," the circumstances of democracy counsel against imagining an association of gods where new citizens are never born and existing citizens never die.³⁶ The (N) principle is more radical than a simple recognition

³⁴ Thomas Jefferson, "Letter to James Madison, Paris, September 6, 1789," in *The Life and Selected Writings of Thomas Jefferson*, eds. Adrienne Koch and William Peden (New York: Modern Library, 1998): p. 451.

³⁵ Jane Mansbridge, "On the Importance of Getting Things Done," *PS* 45 (2012): pp. 1-8.

³⁶ John Rawls, *A Theory of Justice* (Cambridge, Mass.: Harvard University Press, 1971): p. 129.

of democratic imperfection; it is also a recognition that imperfection is constitutive of democracy itself.

The nature of the next affected principle brings compromise and dissent into closer alignment with agonistic democratic theory in several ways. First, it is an account of legitimacy that can much more thoroughly incorporate what Connolly and others refer to as late modern contingency and the concomitant *ressentiment* that afflicts democratic citizens. In *Identity\Difference*, Connolly writes that the globalization of contingency—the propensity for both major and seemingly minor events and systems anywhere to affect life everywhere—undermines traditional theories of legitimacy and the state by undermining the ability of political actors to decisively shape events even within their own borders. Under conditions of late modernity, Connolly writes,

the worldwide web of systemic interdependencies has become more tightly drawn, while no political entity or alliance can attain the level of efficiency needed to master this system and its effects. This fundamental asymmetry between the appropriate level of political reflection (the world of late modernity itself) and the actual capacity for collective action (the state and various regional alliances of states) cannot be transcended by any discernible means.³⁷

The decentralized, global characteristics of late modernity—political, financial, military, environmental, and medical—“signify a widening gap between the power of the most powerful states and the power they would require to be self-governing and self-determining.”³⁸

The globalization of contingency has only increased its reach since Connolly wrote *Identity\Difference* two decades ago. The 2008 financial crisis and the ongoing recession that followed in its wake—where foreclosures in Las Vegas contributed to depression, austerity, and (at least indirectly) the rise of fascism in Greece—is only the most pronounced example of the ways in which increasing technological efficiency, speed, and corporate dominance of political

³⁷ Connolly, *ID*: pp. 23-24.

³⁸ *Ibid.*: p. 24.

will formation have made life perilous for citizens of the twenty first century world. If the state no longer has the ability to act independently within its own borders, are traditional theories of democratic legitimacy obsolete?

While Connolly's discussion of globalized contingency undermines the grounds for deliberative democracy, compromise and dissent offers a more credible path to legitimacy in late modernity for at least three reasons. First, the (N) principle and political compromise in general are not attached to specific state institutions in the same way as traditional theories of deliberative democracy. While a state-based theory of democratic legitimacy is doomed to failure in a world where states cannot act even within their own borders, a theory that turns on movements of opposition is considerably more nimble. Deep dissent emerges in multiple places in multiple ways, often on a transnational basis, and the solutions it seeks often transcend conventional territories. Paradigmatic of what I understand to be central to deep dissent is the Occupy movement, which emerged as a response to precisely the type of globalized contingency that Connolly discusses in *Identity/Difference*. While its original manifestation, Occupy Wall Street, was framed explicitly as a response to inequality in the United States and the chaos wrought by the American financial sector, it soon spread to multiple cities around the world and adopted a multiplicity of (sometimes contradictory) positions. But one feature of the movement was evident: despite their rhetoric about the "99 percent" in the United States, Occupy did not organize around a straightforward set of state-level demands. Rather, it was—as Judith Butler said in a speech at Zucotti Park during the height of the occupation—"assembling in public...coming together as bodies in alliance, in the street and in the square" and "making democracy."³⁹ A satisfactory compromise with the Occupy movement would have required a

³⁹ Judith Butler, "Bodies in Public, Remarks at Zuccotti Park, October 23," in *Occupy! Scenes from Occupied America* (London: Verso, 2011): p. 193.

settlement much more wide-ranging than something akin to the Dodd-Frank financial regulation legislation. Rather, it would have necessitated a deeper shift in the relation between citizens, the state, and the capitalist economy, as I describe in detail in Chapter 2.

Second, compromise and dissent is not only attuned to the unpredictability that marks late modern contingency, but in fact hinges on it. When we shift the burden of legitimacy from satisfying “all affected” to “next affected,” we are injecting a temporal dimension that does not affect to know with certainty the future identity or interests of the democratic community. A theory of legitimacy that turns on uncertainty is more equipped to handle the fragility of contingency because the condition for its possibility is woven into contingency itself, whether the “next affected” takes the form of new ethnic identities from immigration, new sexual identities that had been sublimated by heteronormative public discourse, new political value claims that stretch the boundaries of available political rhetoric (e.g. the environmental movement in its beginnings), or something else entirely that cannot be put into words in advance. Compromise and dissent brings on board the reality of late modern contingency while retaining a positive framework for legitimacy.

Third and finally, compromise and dissent is more consistent with the reality of late modern contingency because it is a model of legitimacy that turns on mass movements, which have become an increasingly normal component of democratic life. The advantage of movements of deep dissent is that they have the potential to be both transnational and democratic, unlike state-level institutions—which may be democratic, but not transnational—or international pacts and institutions—which may be transnational, but not fully democratic. While national governments will always present a patchwork of rules that are susceptible to exogenous resource shocks, foreign financial manipulation, and undercutting by other states, social

movements are capable of presenting a united—or at least consistent—front that places similar demands on multiple state and international institutions. Of course, there is no guarantee that these institutions will be successful, but, as I will explain below, this only makes compromise and dissent a more realistic theory of democratic legitimacy.

(2) The second feature of compromise and dissent that brings it into closer alignment with agonistic democracy is its insistence on building impermanence and uncertainty into democratic procedures. Deliberative democrats' inattentiveness to the shifting boundaries of identity and the non-teleological nature of political change has been fingered by agonists as one of the most significant shortcomings of the model. In *The Democratic Paradox*, Chantal Mouffe aligns herself with Carl Schmitt in suggesting that deliberative democracy and liberalism in general err by refusing to come to terms with the necessary moment of closure in politics; in order for politics to occur, there must be an antecedent "political articulation" of the people, meaning that democratic decisions can never be subject simply to a free-floating rationality unlocked by ideal deliberative procedures. Where she differs with both Schmitt and the deliberativists, however, is in the nature of that political articulation:

Democratic politics does not consist in the moment when a fully constituted people exercises its rule. The moment of rule is indissociable from the very struggle about the definition of the people, about the constitution of its identity. Such an identity, however, can never be fully constituted, and it can exist only through multiple and competing forms of *identifications*. Liberal democracy is precisely the recognition of this constitutive gap between the people and its various identifications. Hence the importance of leaving this space of contestation forever open, instead of trying to fill it through the establishment of a supposedly 'rational' consensus.⁴⁰

With compromise and dissent, I mean to take seriously the field of contestation that Mouffe places at the center of collective life. The (N) principle is fairly explicitly a test of legitimacy that turns on political contestation; the compromise is a settlement that keeps open the

⁴⁰ Chantal Mouffe, *The Democratic Paradox* (London: Verso, 2000): p. 56.

space of contestation after the “next affected” party raises an objection. At the same time, in deferring political closure the (N) principle avoids the problem of obscuring the moment of ontological choice that Mouffe finds so problematic in contemporary democratic theory. By shifting the framework from Habermas’s original “all affected” to “next affected,” I mean to remedy some of the problems associated with a free-floating rationality that exists more as an abstract, emergent quality of deliberation than the product of real citizens of flesh and blood; the ostensibly minor shift from “all” to “next” reconnects democratic deliberation to the concrete particularity of citizens with interests. In short, compromise and dissent brings ontology into deliberative democracy.

Similarly to its relation to particularity and contestation, compromise and dissent also excises any hint of teleology from the deliberative project. The problem of Whig history in deliberative democracy has been persuasively discussed by Bonnie Honig. In “Dead Rights, Live Futures,” a response to Habermas’s “Constitutional Democracy,” Honig rejects Habermas’s portrayal of constitutionalism as a “self-corrective learning process”; even if Habermas intends this language to present the democratic constitution as an open-ended process rather than a permanent document that can never be overridden—even if, in other words, Habermas attempts to embrace a sort of democratic impermanence or provisionality—he ultimately fails because he maintains a guarantee of progress.

Why does this matter? It matters because when Habermas characterizes his hoped-for future in progressive terms, he turns that future into a ground. Its character as a future is undone by progress' guarantee. The agency of the present generation, on behalf of which Habermas lays out his argument, is now in the service of a set of forces quite beyond itself, which it may only fulfill or betray, speed up or slow down. It may not author or make or inaugurate its future... History moves on and our actions just place us on the right or wrong side of it. Thus, Habermas legitimates constitutional democracy by way of a promised

future reconciliation, but what if democratic agency is the price of this particular solution to the problem?⁴¹

By emphasizing acts of dissent and the non-ideal compromises that follow in their wake, the (N) principle brings the political—both in the Schmittian sense of struggle and in Rancière’s sense of bringing new subjectivities into being—back into democratic politics. It takes Habermas’s “*dynamic understanding* of the constitution as an unfinished project” more radically, as a project without a fixed set of instructions. Because of the unpredictability of the sources and types of dissent that may emerge—the character of the “no”s—there can be no progressive teleology built into the theory. Compromise and dissent not only takes difference and contestation seriously, but fragility and uncertainty as well.

4.3.2: Alternative forms of communication

The previous subsection introduced a temporal dimension into Habermas’s “all affected” principle. The corollary of considering different types of affectedness in a democratic deliberation is consideration of different types of discourse. Just as a particularistic and temporally bounded conception of “affectedness” can create blind spots that lead to the exclusion of others, so can narrow conceptions of communication lead to inaccessible democratic discourses. While I believe that many of the polemics against deliberative reason as hegemonic or inherently masculine are overstated, there are at least two senses in which discursive reason can be exclusive in a direct and tangible way.

First, class difference tracks fairly directly not only with political influence (in the form of unaccountable moneyed power that deliberative democracy is set up to combat), but also with a certain type of communicative competency. This is the case for both obvious and less

⁴¹ Bonnie Honig, “Dead Rights, Live Futures: A Reply to Habermas’s ‘Constitutional Democracy,’” *Political Theory* 29 (2001): p. 797.

immediately apparent reasons, with the most simple reason being that class tends to correlate with educational attainment and quality; the wealthier you are, the more likely you are to have had access to higher education and to have attended elite schools. The wealthy are better “deliberators” because they are more likely to have been trained to deliberate. Conversely, the less wealthy you are, the more likely it is that you did not have access to higher education or well-funded schools. As many have noted, the educational system (particularly in the United States) tends to reinforce class separation, and this naturally spills over into the discursive arena.

Class difference also leads to discursive exclusion for a less obvious reason: what Pierre Bourdieu called the “habitus.” While *habitus* can appear hopelessly obtuse to a first-time reader of Bourdieu (Bourdieu describes it as “structured structures predisposed to function as structuring structures”⁴²), there is a fairly straightforward way it operates in the field of democratic discourses that is in some ways analogous to Wittgenstein’s idea of “language games.” *Habitus*, in plain English, is the structure of everyday interactions and practices, structure that has a clear communicative dimension:

in the interaction between two agents or groups of agents endowed with the same habitus (say A and B), everything takes place as if the actions of each of them (say a1 for A) were organized in relation to the reactions they call forth from any agent possessing the same habitus (say, b1, B’s reaction to a1) so that they objectively imply anticipation of the reaction which these reactions in turn call forth (say a2, the reaction to b1).⁴³

While Bourdieu does not deny individual agency (he saw himself more as a scientist rather than a Marxian critic of ideology), he nevertheless saw *habitus* as a conditioning structure on communication. Rather than a deterministic *cause* of actions, the *habitus* is more of a communicative shorthand that renders symbolic systems comprehensible: “The habitus is the

⁴² Pierre Bourdieu, *Outline of a Theory of Practice*, trans. Richard Nice (Cambridge: Cambridge University Press, 1977): p. 72.

⁴³ *Ibid.*: p. 73.

universalizing mediation which causes an individual agent's practices, without either explicit reason or signifying intent, to be none the less 'sensible' and 'reasonable.'"⁴⁴

The influence *habitus* may have on deliberative democracy is not difficult to imagine. If symbolic interaction is structured by regulated sets of expectations, discourses can easily become inaccessible to those outside the groups or classes who initiate them. Practical discourse is not only restricted by technical competency (say, familiarity with Robert's Rules of Order, or with the particular economic theories that frequently animate trade policy debates), but also by rules that are almost impossible for the uninitiated (initiation that not only includes education at the best schools, but also lessons in etiquette, dress, and particular aesthetic sensibilities) to learn. In Habermasian terms, *habitus* restricts the field of the lifeworld, limiting practical discourse's ability to ever get off the ground.

In even more obvious ways, language can restrict the possibility of democratic legitimation. As the chief medium of political will-formation, language holds a central place in both communicative and democratic theory, but its application—as many critics of deliberative democracy have pointed out—is more fraught than deliberativists tend to recognize. This type of political exclusion, as with the *habitus* described above, is what Iris Marion Young called “internal exclusion,” which “concern ways that people lack effective opportunity to influence the thinking of others even when they have access to fora and procedures of decision-making.”⁴⁵ Language can be a form of internal exclusion in fairly straightforward ways (in a multilingual democracy such as the United States or India, for instance, a lack of proficiency in the dominant language of the state can make formal inclusion meaningless), and in ways that are less direct: arguments made in African-American Vernacular English or in regional accents historically

⁴⁴ Ibid.: p. 79.

⁴⁵ Young, *Inclusion and Democracy*: p. 55.

associated with the working class are likely to have different effects on white elites than arguments made in unaccented academic English, for instance.

In taking these difficulties with language seriously, Young proposed a framework for political communication that was meant to be an alternative to traditional deliberative democracy. As an affirmative corollary to her critique of deliberative democracy (discussed earlier in this chapter, and based on some of the same issues I brought up in the preceding paragraphs), Young offered three additional types of communication: greeting (“to evoke the everyday pragmatic mode in which we experience... acknowledgment”⁴⁶), rhetoric (which “announces the situatedness of communication”⁴⁷), and storytelling (which “reveals the particular experiences of those in social locations,” “a source of values, culture, and meaning,” and “a total social knowledge from the point of view of that social position”⁴⁸). Through these communicative techniques, Young argues that deliberators can avoid merely instantiating the will of those who (in Lynn Sanders’s words) “appear already to be acting democratically.”⁴⁹ By incorporating a wider array of discursive forms, Habermas’s “forceless force” really can be that of the better argument, rather than the more skillfully delivered one.

* * *

By introducing compromise and dissent into the deliberative paradigm, we can salvage both the radicalism of agonistic democracy and the optimism of deliberative democracy. Both of these can be accomplished without sacrificing the appeal of either research program. While this project may end up being closer to deliberation than agonism, I hope it will exist in conversation with theorists from both camps.

⁴⁶ Iris Marion Young, “Communication and the Other: Beyond Deliberative Democracy,” in *Democracy and Difference: Contesting the Boundaries of the Political* (Princeton, NJ: Princeton University Press, 1996): p. 129.

⁴⁷ Ibid.: p. 130.

⁴⁸ Ibid.: pp. 131, 132.

⁴⁹ Sanders: p. 349.

Chapter 5: Deferring closure in the land of the future: compromise and the *Bolsa Família* program in Brazil

In 2002, Luiz Inácio Lula da Silva was elected as the 35th president of the Republic of Brazil—and the fifth since the end of the country’s military dictatorship, which had ruled Brazil since the armed forces overthrew the elected government of João Goulart in 1964.¹ It wasn’t long before observers recognized the Lulista ascendance for what it was: the most significant presidential election and administration since the two-decade rule of Gétúlio Vargas between 1930 and 1954.² After perennial candidacies since 1989, Lula and the Workers Party (*Partido dos Trabalhadores*, or PT) had formed the first left-wing government in the history of one of the world’s most unequal nations. Near the end of his second term, he was described by Barack Obama as the “most popular politician on Earth,” and it wasn’t much of an exaggeration: as he left office in January 2011, a poll by Folha de São Paulo found that he enjoyed an approval rating of 83%, the highest figure for any Brazilian president since the country’s return to democracy.³

While Lula has become well-known in the United States for his distinctive foreign policy (he followed an internationalist approach that drew comparisons with the Non-Aligned Movement of the Cold War, while also playing a central role in foiling the neoliberal Free Trade

¹ Although in a country as politically complex as Brazil, even the “elected” nature of Goulart’s government comes with an asterisk: he was originally elected as the vice presidential candidate for Jânio Quadros, a conservative populist who quit the presidency in 1961 after serving for less than eight months. Although he cited “occult forces” as the impetus for his resignation in a letter, he is widely interpreted to have been furtively blaming the military and its traditional elite supporters. Aspásia Camago, “Federalism and National Identity,” in *Brazil: A Century of Change*, eds. Ignacy Sachs, Jorge Wilhelm, and Paul Sérgio Pinheiro, trans. Robert N. Anderson (Chapel Hill: University of North Carolina Press, 2009): p. 223.

² Vargas had two non-consecutive presidential administrations, the first (following a coup) from 1930-1945 and the second (following a democratic election) from 1950-1954.

³ “Obama: Lula Is ‘Most Popular Politician on Earth,’” *Associated Press*, April 2, 2009 <http://www.huffingtonpost.com/2009/04/02/obama-lula-is-most-popula_n_182433.html>; Helder Marinho, “Brazil’s Lula Leaves Office With 83% Approval Rating, Folha Says,” *Bloomberg*, December 19, 2010 <<http://www.bloomberg.com/news/2010-12-19/brazil-s-lula-leaves-office-with-83-approval-rating-folha-says.html>>.

Area of the Americas proposal), this chapter is concerned with Brazil's domestic policy during the PT governments of Lula and Dilma Rousseff, and specifically the *Bolsa Familia* ("family fund") program. On the surface, there is nothing that seems particularly innovative about the *Bolsa*: it is a system of conditional cash transfer programs similar in some respects to the "negative income tax" that exists elsewhere—including in the United States as the Earned Income Tax Credit. Under its largest component program, poor mothers are entitled to a government benefit of up to 95 reais per month, with the condition that they their children are vaccinated and go to school instead of into the workforce.⁴ While the *Bolsa* existed before the election of Lula in 2002, his government radically expanded it and placed it at the center of his *Fome Zero* ("zero hunger") agenda.

As both politics and policy, the program has been a success: not only has it been consistently popular among the Brazilian electorate (in the 2010 presidential election, the PT's eventual winner Dilma Rousseff and her PSDB opponent José Serra both promised to expand the program), but it has also coincided with a sharp drop in inequality in Brazil. Between 2003 and 2008, the rate of people living in extreme poverty fell by 20 million, while the percentage of people too poor to feed themselves fell from 17 percent to 8.8 percent.⁵ Its efficacy has been praised not only by Lula's working-class and poor electoral base, but also by neoliberal organs like *The Economist* and *The Financial Times*.⁶

While the *Bolsa*'s substantive achievements have been impressive in their own right, in this chapter I will argue that the recent history of social policy in Brazil is an example of

⁴ "Brazil: Happy families," *The Economist*, February 7, 2008
<<http://www.economist.com/node/10650663>>.

⁵ "Brazil's presidential campaign: In Lula's footsteps," *The Economist*, July 1, 2010
<<http://www.economist.com/node/16486525>>.

⁶ E.g. "Brazil's *Bolsa Familia* relieves poverty," *The Financial Times*, March 13, 2012
<<http://www.ft.com/intl/cms/s/0/383530cc-8afe-11e2-b1a4-00144feabdc0.html#axzz2g7p6cS00>>.

democratic compromise at its best: a movement (the PT) found middle ground with politically powerful groups (the neoliberal establishment, including their center-right rival *Partido da Social Democracia Brasileira*), but a final resolution for poverty and inequality in Brazil was self consciously pushed into the future.

I will begin by outlining the early history of the *Partido dos Trabalhadores* and explain how it can be considered to be a movement of “deep dissent” (a concept that is critical to the workability of the (N) principle). In section 5.2, I will discuss the PT’s rise to power, with particular emphasis on the transformation it underwent from being a radical leftist oppositional movement to the head of a governing coalition—a metamorphosis in which the *Bolsa Família* was a critical component. In section 5.3 I will discuss post-Lula Brazil. In it, I will hypothesize that the recent mass protests in Brazil’s major cities represent another movement of deep dissent—and another ground for application of the (N) principle. Finally, in section 5.3 I will offer some concluding remarks for the project as a whole.

5.1: The PT emerges: a party and a movement

Since 2002, the PT’s rise to political dominance in Brazil has been understood to be one part of a larger left-wing resurgence across South America. Between 1998 and 2006, the region saw a string of presidential election victories for parties of the left: Hugo Chávez in Venezuela, Néstor Kirchner in Argentina, Michelle Bachelet in Chile, Evo Morales in Bolivia, Rafael Correa in Ecuador, Tabare Vasquez in Uruguay, and Lula in Brazil. More recently, José Mujica—a former member of the *Tupamaro* guerrilla movement—has succeeded Vasquez as President of Uruguay, while Venezuela (Nicolas Maduro) and Brazil (Dilma Rousseff) have also seen leftist successions. Although these parties varied dramatically in their radicalism—ranging from the

pragmatic social democracy of Bachelet to the Bolivarianism of Chávez—they were understood by many outside observers as parts of a broader “pink tide” sweeping Latin America.⁷

Placing all of these countries into a single category, however, obscures much of the subtlety and uniqueness of each nation’s experience. This is particularly evident if we examine the peculiar role that leftist politics has had in Brazil. While the elections in these other countries were a return to power of sorts for leftist groups that had been suppressed during the Cold War, things were very different in Brazil, which Emir Sader and Ken Silverstein have called “a country with no leftist tradition.”⁸ While there have been leftist parties in Brazil, with the Soviet-backed Brazilian Communist Party (PCB) emerging in 1922 and its Maoist offshoot Communist Party of Brazil (PCdoB) remaining a force in Brazilian politics, they were supplanted and later banned during the Getúlio Vargas government. Vargas, like the Perons in Argentina, was a populist whose specific ideological content varied from year to year: while he was known as the “father of the poor” for his social welfare policies, he was also open to the highest bidder as World War II began (although Brazil would eventually side with the Allies and send troops to the European theatre).⁹ Many of the PCB’s leaders were arrested after the Communist Uprising of 1935, and while they would participate in the 1945 presidential election, their ability to organize was swamped by the rise of state-sanctioned, management-controlled labor unions that were created under Vargas and would flourish into the 1970s.¹⁰ Things only became more dire for the country’s weak left after the military dictatorship rose to power in 1964. While some leftist groups continued to operate underground—including the guerrilla group *Comando de*

⁷ “South America’s leftward sweep,” *BBC News*, March 2, 2005
<<http://news.bbc.co.uk/2/hi/americas/4311957.stm>>.

⁸ Emir Sader and Ken Silverstein, *Without Fear of Being Happy: Lula, The Workers’ Party and Brazil* (London: Verso, 1991): pp. 9-16.

⁹ Roberto Gambini, *O Duplo Jogo de Getúlio Vargas: Influência Americana e Alemã no Estado Novo* (São Paulo: Símbolo, 1977): pp. 78, 169.

¹⁰ Sader and Silverstein: p. 10-11.

Libertação Nacional, of which current president Dilma was a member in the late 1960s—the position of leftist parties was bleak by 1973, with the military regime having suppressed any threats to its domination.

The PT itself developed out of a series of illegal strikes that shook Brazilian industry in the 1970s. Lula experienced his first political education with a group of radical São Paulo unionists called the “authentic.” When he first gained a job as a machinist at a capital-goods manufacturer in 1963, Lula was suspicious of the unions, having been brought up in a family that believed union leaders “were only thieves, that all the leaders were crooks.”¹¹ However, his Communist brother quickly got him involved in organized labor, and in 1972 he was elected to the directory board of the São Bernardo Metalworkers Union then as president of the union in 1975.¹² He was radicalized shortly thereafter when his brother was arrested, and the union began to join a growing chorus of voices in opposition to the military regime, which had presided over an economy that had increasingly high costs of living combined with even greater economic inequality. Between 1978 and 1980, Lula would lead and participate in increasingly massive strikes, including a general strike in 1979 that received so much support union assemblies were held in Vila Euclides stadium to accommodate the 80,000 attendees. In 1979 alone, 3.2 million workers in 15 states participated in a total of 113 strikes. While the regime would attempt to suppress the unions in 1981, including by shutting down the SBMU and arresting Lula himself, the regime had largely lost control of the country’s economy and politics, and as the 1980s began a true political opening seemed to be on the horizon.

In describing the strikes, Lula would frame them in the classic language of civil disobedience: “The strike can be considered illegal, but it is just and legitimate, because its

¹¹ Ibid.: p. 40.

¹² Ibid. São Bernardo is a working class suburb to the south of the City of São Paulo.

illegality is based on laws that weren't made by us or our representatives."¹³ This same approach of mass dissent would inform the PT in its early days, tactics that inspired Silverstein and Sader to describe the PT as "far more than an average political party, and [a party that] in many ways more closely resembles a social movement."¹⁴ The party (with initial reluctance from Lula and other leaders of the labor movement) was formed in 1979, and its membership was closely tied with the unions, with sixty percent of its members holding union memberships.¹⁵ It is not hard to see the influence of the union organizers in the "*Diretas Já!*" ("Direct Elections Now!") movement in 1983 and 1984, which called for direct elections for the 1984 presidential election. After a party reform act was passed in 1979, Brazil held their first open congressional elections since the military seized control of the country. Democratic reformers, however, did not believe the law went far enough: presidential elections would still be decided in an electoral college over which the military would exercise undue control. DJ organized what was at the time the largest political demonstration in the history of Brazil, as 300,000 crowded into São Paulo's *Praça da Sé*, a major downtown square in front of the city's cathedral.¹⁶ This location was fitting, as left-leaning Catholic clergy, particularly Cardinal Paulo Evaristo Arns of São Paulo, had been supportive of the strikers and the wider democracy movement—part of an emerging network of leftist political action on a scale that Brazil had never seen.¹⁷

In short, the PT emerged as a vanguard group in a movement of *deep dissent* erupting throughout Brazilian society. Earlier, I defined deep dissent as *a challenge made by the politically powerless to the self-understanding of the democratic constitutional order*. By this I mean to distinguish dissent from mere disagreement; disagreement can occur between powerful

¹³ Ibid.: p. 43.

¹⁴ Ibid.: p. 3.

¹⁵ Ibid.: p. 50.

¹⁶ Ibid.: p. 25.

¹⁷ Ibid.: p. 36.

groups and individuals, but dissent is directional from below. Moreover, by calling the voice of deep dissent a challenge to the status quo self understanding of the democratic constitutional order, I am emphasizing that deep dissent constitutes the emergence of the *new*: the rise of the new left in Brazil was, in this sense, an instance of the political in Rancière's sense, with the PT and the strikers as "those who have no right to be counted as speaking beings [making] themselves of some account."¹⁸ As I discussed earlier, deep dissent plays a dual role in political compromise: not only does it demand compromise through the (N) principle, but it also provides the substantive fuel for the compromises themselves. The PT and Brazilian left's role as a movement of deep dissent sets it up as an important case study for compromise and dissent. And as I will discuss below, the PT's transition from a peripheral actor to the pinnacle of the establishment would test the possibility of a futurity-oriented model of political compromise.

5.2: The PT in power: the *Bolsa Família* and political compromise

During its early years, up to and including Lula's landmark run for the presidency in 1989, the ideology of the PT was similar to other left-wing political parties in the Americas and Europe: "socialism was always a principal demand, just as the working-class...was considered to be the political vanguard."¹⁹ While the groups that came together to support the PT were diverse in both origin and worldview—not only union members, but also the Catholic left, Marxist intellectuals, Trotskyists, and others—they were "united by their radical resistance to the State and capitalism."²⁰ At the same time, democracy remained one of the party's core values, something that distinguished the party from the Marxist-Leninist left. Both of these values were reflected in

¹⁸ Jacques Rancière, *Dis-Agreement: Politics and Philosophy*, trans. Julie Rose (Minneapolis: University of Minnesota Press, 1999): p. 27.

¹⁹ Sader and Silverstein: p. 103.

²⁰ *Ibid.*: p. 105.

their 1990 platform, which placed the party in the role of resting democratic values from the bourgeoisie. It stated that “democracy, understood as the wide aggregate of a citizens’ right to political participation and representation, cannot be seen as a bourgeois value, incorporated with reservations by the workers’ movement,” and that “there will only be true democracy with socialism and no socialism without democracy.”²¹ This dedication to socialism and the working class was paired with a rejection of social democratic reform; while a minority in the party supported social democracy, according to Sader and Silverstein the party as a whole understood it to be “the social rule of the bourgeois state and a capitalist economy, a system capable of recycling but not resolving the problems inherent in a class-based society.”²²

By placing conditional cash transfers at the center of the PT’s agenda, Lula was moving away from the PT’s original agenda in at least two respects. First, the program marked a shift in emphasis for the party from its historic base in the unionized working class to the very poor. The beneficiaries of the *Bolsa Familia* are the poorest of the poor, with incomes capped at \$68 per month in 2008, and the region that has received the greatest benefit from the program is the poverty-stricken Northeast rather than the industrialized Southeast (which includes São Paulo, the historic home of the Brazilian labor movement). This shift is related to a second change: rather than advancing a final goal of socialism (whether democratic or otherwise), the *Bolsa* represents a rapprochement of sorts with business conservatives and neoliberal institutions like the World Bank and International Monetary Fund. At its core, the program is the very sort of social democratic reform that the party had disdained in its earlier, more radical years. This type of positioning has led some commentators to suggest that Lula has made peace with the establishment, abandoning the party’s core values, accompanied as it was (at least at the

²¹ Ibid.: p. 107. Quotation is from the PT’s May 1990 political statement.

²² Ibid.

beginning of his presidency) by a tight monetary policy and cooperation with the IMF in reducing the public debt.²³

Conditional cash transfer (CCT) programs were originally a policy created at the local level in the Federal District of Brasília, and later extended to the national level by Lula's predecessor Fernando Henrique Cardoso of the center-right PSDB. Lula originally came into office with a platform he called *Fome Zero* (Zero Hunger), which promised to eliminate malnutrition before Lula left office. The program originally included not only cash transfers, but also direct food aid to the poor; however, it was administered through systems inherited from the Cardoso government that proved woefully insufficient for the task, including reliance on a database that covered only 70 percent of the population.²⁴ In light of these problems, in October 2003 Lula integrated the four extant CCT programs—*Bolsa Escola* program rewarding children's school attendance, *Bolsa Alimentação* for maternal nutrition, *Cartão Alimentação* food debit program, and *Auxílio Gás* cooking gas subsidy—under the single heading of *Bolsa Família*. More importantly, he dramatically increased the state's expenditures on all of these programs: spending on the programs that make up *Bolsa Família* increased from R\$2.4 billion in 2002 to an estimated R\$8.3 billion by 2006.²⁵ Rather than a revolutionary restructuring of Brazil's power structure, Lula was expanding a program that had been favored (albeit in a more limited form) by his erstwhile neoliberal adversaries—and which, in fact, would ultimately gain the imprimatur of the IMF and World Bank.²⁶

²³ Sue Branford and Bernardo Kucinski, *Lula and the Workers Party in Brazil* (London: New Press, 2003): pp. 8-9.

²⁴ Anthony Hall, "From Fome Zero to Bolsa Família: Social Policies and Poverty Alleviation Under Lula," *Journal of Latin American Studies* 38 (2006): p. 696.

²⁵ *Ibid.*: p. 693.

²⁶ *Ibid.*: p. 695.

On one hand this development can be interpreted cynically, as the manifestation of what Lula's friend and PT comrade Frei Batto said about Brazilian politics a few months after Lula's first inauguration: "We are in a government but not in power. Power today is global power, the power of big companies, the power of financial capital."²⁷ In this interpretation, the PT's trek from socialist vanguard to social democratic pragmatists is simply a reflection of many would-be revolutionary governments in Latin America and beyond: after talking a big game about fundamentally changing the country's social contract, they retreated in the face of resistance by the real kingmakers of world history, and ultimately enjoyed the privilege of rule more than the ends of empowerment. If this is the case, it is a particularly tragic story: the PT was the first truly left-wing movement to make a mark in Brazilian politics, and a government that was both genuinely leftist and resolutely democratic—in a country that is spectacularly unequal even by the standards of a region historically ruled by plutocratic regimes—may have served as the most effective model yet for resistance to the Washington Consensus.

There is, however, another interpretive option. It requires, however, taking Lula at his word when he says that "a negotiated solution is always better than a law passed by a majority against the wish of a minority" and that he governed by "[putting] forward a proposal to society and then [letting] people discuss it."²⁸ In this understanding, the domestic policy of Lula can be understood as a compromise between the PT leadership, the business conservatives and IMF/World Bank, and the radicals on the left-wing of the PT. While it did not satisfy either the party stalwarts or the country's right-of-center politicians and business interests (some of whom argued, in the style of American rightists, that CCTs would only cultivate economic dependency and that obesity was a bigger problem than hunger—in a country with regions that to this day

²⁷ Branford and Kucinski: p. 5.

²⁸ *Ibid.*: p. 14.

have infant mortality rates above 40 percent), the *Bolsa* constituted a pragmatic devotion to meliorism, and as an extension to compromise at its best.²⁹

The PT began as a movement of deep dissent, and in order to take control of a ruling coalition in Brazil they had to compromise on their ultimate goals. The result, including *Bolsa Familia*, achieved some real good, at least contributing to dramatic reductions in the country's rate of inequality.³⁰ At the same time, they backed away from some of their longstanding commitments, and this resulted in at least some members breaking away from the party (most notably to form the *Partido Socialismo e Liberdade* (PSOL), the Socialism and Freedom Party).³¹ The key point is that the *Bolsa* was never going to be the final fix to economic inequality in Brazil, and any final closure on Brazil's place in the world was necessarily deferred into the future. This radical potential of political compromise was made plain with the nationwide protests that shook the country in the summer of 2013, as I will explain in the next section.

5.3: The PT as establishment: Dilma, *Mensalão*, and the protests of 2013

In 2010, Dilma Rousseff was elected President of Brazil, with the PT riding a wave of very high popularity during the last years of the Lula government. In almost every way, Dilma cuts a very different profile from Lula: not only is she the country's first woman head of state, but also became a PT member through a very different path.³² While Lula was a product of the labor movement, rising to leadership in his union after having worked as a machinist for more than a

²⁹ Richard Bourne, *Lula of Brazil: The Story So Far* (Berkeley: University of California, 2008): p. 127.

³⁰ As with anything, the precise impact of *Bolsa* on inequality is difficult to measure, and some credit the country's recent rapid economic growth ahead of redistributive programs. E.g. Hall: p. 699-700.

³¹ *Ibid.*: p. 105.

³² Princess Isabel served as Emperor Dom Pedro II regent on three occasions (during one of which Brazil abolished slavery)

decade, Dilma is a professional politician whose first entry into politics was as a Marxist guerilla in the *Comando de Libertação Nacional* (National Liberation Command). She had held a series of cabinet posts in the state of Rio Grande do Sul and its capital of Porto Alegre as a member of the *Partido Democrático Trabalhista* (the Democratic Labor Party, or PDT, of which she was a founding member) in the 1980s, but after joining the PT she served as Minister of Energy and Chief of Staff in Lula's government.³³ While her history as a leftist intellectual is not out of keeping with the PT's historic base—and her history with Colina, including a three-year period in prison during which she was tortured by the military regime, proves her leftist bona fides—Dilma is by no means a party old timer.³⁴

Her administration has also undergone political pressures that Lula never faced. One of the biggest of these was the *mensalão* (“big monthly salary”) corruption scandal. While the story actually broke during Lula's first term in office (and is fingered as the reason he required a runoff election to win reelection in 2006), it reemerged as a major issue when the parties to the scandal, particularly party stalwart José Dirceu, went on trial in 2012. *Mensalão* was a fairly straightforward vote-buying scheme, in which members of coalition partner *Partido Trabalhista Brasileiro* (Brazilian Labor Party, or PTB) received state-backed salaries in exchange for support of the Lula government's programs.³⁵ This was no surprise from the PTB, which was infamously one of Brazil's most corrupt political parties, but it flew in the face of the PT's commitment to clean and open government that had been instrumental in their rise to power.³⁶ The trial itself, argued before the Brazilian Supreme Court and concluded in December 2012, was a made-for-

³³ “Profile: Brazil's first female president Dilma Rousseff,” *Xinhua*, January 2, 2011, <http://news.xinhuanet.com/english2010/world/2011-01/02/c_13673640.htm>.

³⁴ Stan Lehman, “Brazil president-elect's guerilla past described,” *Associated Press*, November 20, 2010.

³⁵ Bourne: pp. 177-180.

³⁶ *Ibid.*: pp. 178, 176.

TV spectacle that resulted in convictions for 25 officials connected to the Lula Administration.³⁷

While the fact that high-ranking officials could be convicted of corruption was viewed by many as a testament to the health of Brazil's political institutions, it left a black mark on the PT (although Lula himself was cleared of wrongdoing, and nobody has even suggested that Dilma had any involvement in the scheme). Despite the PT's history of opposition to corruption and the real progress they made on that front—including a requirement that all public spending be published on the internet, circumvented by money laundering in the case of *mensalão*—it was taken as evidence that the PT was just like the rest, yielding to “the tradition that politics was a business.”³⁸

The second major pressure Dilma faced was much more visible outside of Brazil: the massive protests during the summer of 2013. It is difficult to make judgments about the protests so soon after their occurrence.³⁹ The proximate cause of the uprising was a 20 centavo increase in bus fares, but the matrix of issues that brought the rage to fermentation included not only the perceived corruption of politicians in Brasília, but also the massive public outlays going toward the 2014 FIFA World Cup, poor public infrastructure (particularly public transportation, which charges increasingly high fares for service that is spotty at best⁴⁰), and one of the world's worst

³⁷ “Corruption in Brazil: A healthier menu,” *The Economist*, December 22, 2012, <<http://www.economist.com/news/americas/21568722-historic-trial-those-guilty-legislative-votes-cash-scheme-draws-close>>.

³⁸ Bourne: p. 188, 186.

³⁹ One thing that should be clear, however: linking them with concurrent protests in Egypt, as some American commentators obtusely did, is at best lazy and at worst racist. E.g. Ezra Klein, “The protests in Turkey, Brazil and Egypt shouldn't surprise you,” *The Washington Post*, July 2, 2013 <<http://www.washingtonpost.com/blogs/wonkblog/wp/2013/07/02/the-protests-in-turkey-brazil-and-egypt-shouldnt-surprise-you/>>.

⁴⁰ One anecdotal example that predates the protests: in Barão Geraldo, the neighborhood of Campinas where I lived during the fall of 2012, the message “R\$2.50 é roubo” (“R\$2.50 is robbery”) was spray-painted on a wall that I passed by each day. While the price, which amounts to \$1.25, may seem low for anyone who has lived in a major American city, these buses are also relied upon by, among others, *diarista* maids who must regularly travel from the favelas and public housing projects near Centro to outlying areas like Barão—often waiting over an hour for buses that run on no set schedule.

public education systems.⁴¹ The protests eventually died down in July of that year, but they had already been some of the largest demonstrations in Brazilian history.

For her part, Dilma bent over backwards to accommodate the demands of the protestors, and even to ally herself with the movement. This included pledges to increase funding for public transportation and to devote oil royalties to public education.⁴² It is this reaction where I see the third step in the story of “deep dissent, compromise, deferral” that I discussed above: by 2013, the PT had become the dominant political force in Brazil, and the protests against it were the next stage of deep dissent. If deep dissent entails voicelessness as I suggested earlier, this may seem strange: the protests were largely demonstrations by middle class Brazilians, hardly the country’s least advantaged group. However, I believe it qualifies for at least two reasons. First, in a country with inequality and corruption on the scale experienced in Brazil, it is not a stretch to say that the middle class had been ignored by elites for most of its existence. While cultivating a middle class had been a chief goal of the Brazilian state for decades, the extent to which they lived decent lives was of passing concern for generations of lawmakers. While the wealthy are able to send their children to private schools and check into luxurious hospitals, the poor, working class, *and* middle class depended on a public sector that had been neglected—something that only became political salient as the middle class became the majority of the country in 2011.⁴³

But even leaving aside the bourgeois hue of the protests, the issue that first crystallized and touched off the protests was one that was barely noticed by those who were neither poor nor

⁴¹ James Surowiecki, “Middle Class Militants,” July 8, 2013 <http://www.newyorker.com/talk/financial/2013/07/08/130708ta_talk_surowiecki>.

⁴² “Brazil protests: Dilma Rousseff unveils reforms,” *BBC News*, June 21, 2013 <<http://www.bbc.co.uk/news/world-latin-america-23012547>>.

⁴³ “A majority of Brazilian (54%) joined the ranks of middle class in eight years,” *Mercopress South Atlantic News Agency*, March 26, 2012 <<http://en.mercopress.com/2012/03/26/a-majority-of-brazilian-54-joined-the-ranks-of-middle-class-in-eight-years>>.

working class: the cost of public transportation. Here, the protests verge more on the voiceless making themselves of some account, as an issue that had tangible effects on the quality of life for millions of citizens was forced into the public sphere. Soon thereafter, the president of Brazil was talking about taking money from Petrobras (the national oil company) to use on public services, a turn of events that can only be described as extraordinary.

* * *

And that reaction by Dilma closes the circle. If deep dissent (the early PT) produced a compromise (*Bolsa Família*) that also entailed deferring into the future any ultimate solution for Brazil's inequality and rigid power structure, then the protests of 2013 can be read as that future coming to pass. The story I have told in this chapter is not an ideal one. While it included tangible achievements and exciting glimmers of the political, it also included the corruption of *mensalão*, the apparent abandonment of a party's socialist dream, and the persistence of material inequality that claims lives every day. But it is also an optimistic story, and one that can serve as a powerful test for both the radical and legitimating potential of political compromise.

5.4: Conclusion: three radical models of democracy

In this dissertation, I have developed a conception of political compromise that is designed to capture the affirmative potential of deliberative democracy along with the critical power of agonism and (explicitly) radical democracy. Much like Habermas positioning discourse theory as a mid-point between communitarian republicanism and Lockean liberalism, I see compromise and dissent as a third way between two dominant models. While Habermas described his approach as one of three *normative* models of democracy, however, I prefer to characterize compromise and dissent as one of three *radical* models of democracy. In this conclusion, I will

explain what I mean by this, and what it means for democratic theory and the future of this research program.

The term “radical democracy” is conventionally applied to contemporary democratic theorists working in what could broadly be called a “post-Marxist” or (as Lasse Thomassen contends) “post-structuralist” tradition.⁴⁴ At the same time, however, it has also been used to describe multiple other approaches to democracy, and (as Alan Keenan writes) this “can make it rather difficult to follow current debates over its meaning and usefulness.”⁴⁵ For my purposes, however, I will go back to the root of the word “radical” which, appropriately, comes from the Latin *radix*, meaning “root.” As Thomassen says, this means that radical democracy can be understood as any school of thought that “challenge what is at the root of democracy as we know it.”⁴⁶

But more substantively, I understand the radicality of democracy to hinge on the extent to which it penetrates society; more than a simple descriptor, radical democracy is a moral-ethical paradigm that guides my understanding of democracy, and which can roughly be stated as follows: *as many institutions and practices of society should be organized democratically as would be practically feasible and morally justifiable*. Fundamentally, this applies to compromise and dissent, agonistic democracy, and deliberative democracy in ways that it does not to Habermas’s understandings of communitarian republicanism (which envisions democracy as a reflection of pre-constituted ethical identities) or liberalism (which is democratic only insofar as democracy is necessary to preserve pre-constituted individual rights).

⁴⁴ Lasse Thomassen, “Radical Democracy,” in *Encyclopedia of Political Theory*, ed. Mark Bevir (Thousand Oaks, Calif.: Sage, 2010): p. 1142.

⁴⁵ Alan Keenan, “The Beautiful Enigma of Radical Democracy,” *Theory and Event* 1.3 (1997) <http://muse.jhu.edu/journals/theory_and_event/v001/1.3r_keenan.html>.

⁴⁶ Thomassen: p. 1141.

In this sense, agonistic democracy and deliberative democracy are radical in very different (though overlapping ways). Discourse theory, and especially Rainer Forst's version of it described in Chapter 3, is a strong proceduralist account not only of democracy, but of justice itself: justice is not a status quo substantive characteristic of a law or regime, but an ongoing practice of justification through discourse. Norms cannot be said to be just unless they have passed a test of communicative legitimacy and been approved by flesh-and-blood interlocutors. While both Habermas and Forst argue that democracy and human rights are "co-original," their mutual reliance is based on the supposition of moral autonomy that is necessary to get discourses off the ground.⁴⁷ Here, democracy penetrates beyond its traditional role as a way of legitimating the coercive power of the state into a more general set of practices that are being carried out constantly in both formal political will-formation and the informal public sphere.

In some obvious ways, agonistic democracy is even more radical than deliberative democracy. Agonists like Mouffe and Honig conceive of democracy as a way of life that cannot be reduced to a regime, and in fact—because it is marked by disruption of stable orders, or as Jacques Rancière writes a "break with the logic of the *arkhê*"—it is almost akin to anarchism.⁴⁸ For the agonists, any limitation or affirmative telos applied to democracy is an inappropriate domestication of the political. As Sheldon Wolin writes, "the reality cloaked in the metaphor of boundaries is the containment of democracy."⁴⁹ To apply my definition of radical democracy as the greatest justifiable penetration of democratic organization in collective life, the agonists can

⁴⁷ E.g. Jürgen Habermas, "On the Internal Relation between Law and Democracy," in *The Inclusion of the Other*, ed. Ciaran Cronin and Pablo De Greiff (Cambridge, Mass.: The MIT Press, 1998): pp. 260-261.

⁴⁸ Jacques Rancière, *Dissensus: Politics and Aesthetics*, ed. and trans. Steven Corcoran (London: Bloomsbury, 2010): p. 31.

⁴⁹ Sheldon Wolin, "Fugitive Democracy," in *Democracy and Difference: Contesting the Boundaries of the Political*, ed. Seyla Benhabib (Princeton, N.J.: Princeton University Press, 1996): p. 33.

be understood as radical democratic maximalists: there can be no limit to democracy's extent, either practically or normatively.

By now, it should be fairly clear where I differ from the agonists and (explicit) radicals: in analyzing a movement like Occupy Wall Street, they would simply celebrate the emergence of mass protests as a manifestation of the political and leave it at that. It wouldn't particularly matter how democratic institutions (or the "police order," as Rancière provocatively describes them) respond except insofar as they refrain from closing off the space for deep dissent to play itself out. By doing this, however, the agonists have deprived democracy of a tangible normative core that goes beyond a sort of revolutionary romanticism. As I have explained, however, by building an explicit temporal dimension into democratic legitimacy I believe that much of agonisms's radical appeal can be salvaged while retaining an affirmative conception of justification.

Because my project is much closer to the deliberative model my relation with authors like Habermas is more complex, and in these last few pages I want to outline the connection more explicitly to draw out its potential as an important shift in the research program. With compromise and dissent, I am trying to take the radicalism that lies at the heart of deliberative democracy and take it to its logical conclusion. If moral equality is the explicit normative core of deliberative democracy (and the implicit normative core of agonistic democracy), what does that mean for our everyday democratic practices? Taking a page from the agonists, I believe that this requires a procedural approach to democracy that recognizes the moral equality not only between the self and the other in the present, but also the self and the other in a continually unfolding and inherently uncertain future, an orientation that I have tried to capture with the next affected principle. By deferring final justification past an unapproachable horizon, I have tried to make

good on the “anarchistic core” of Habermas’s account of deliberative democracy by explicitly extending the penetration of democracy into the future. In this understanding, we share not only a spatial and institutional relation with other subjects in the present, but also a temporal relation with subjects in the future. While compromise and dissent bear a close relation to discourse theory, my radicalization of the communicative paradigm also makes its relation to Habermas more subtle than simple extrapolation.

First, compromise and dissent is “decentered” in a way that is different from Habermas. In Chapter 4, I discussed the nature of the “subject” in my model of democratic legitimacy, distinguishing myself from traditional deliberative democrats (and aligning myself with the agonists) by arguing that the subject should be brought back into discourse theory: drawing on Rancière, I argued that an important feature of democracy is the sense in which it is a process of “subjectivation,” or the assertion of forms of subjectivity that have not been recognized or comprehended by the powerful.⁵⁰ “Politics exists because those who have no right to count themselves as speaking beings make themselves of account,” and democracy is the “very regime of politics itself.”⁵¹

A kernel of decentration remains in the compromise and dissent framework, however, insofar as compromises in the status quo can only ever have a hypothetical idea of how future subjects will act in collective life. In part, it is animated by the idea that, as deliberators in the present, we have to step outside our own situated particularity to acknowledge that we are not the final judges of democratic legitimacy. Compromise and dissent is “decentered” not so much by being “subjectless” as by eschewing any claims about the concrete nature of political

⁵⁰ Rancière, of course, considers subjectivation to be the *sine qua non* of democracy, not just an important feature of it. Because I offer a model of legitimacy, this is an area where I depart from Rancière.

⁵¹ Jacques Rancière, *Disagreement: Politics and Philosophy*, trans. Julie Rose (Minneapolis: University of Minnesota, 1999): p. 27; Jacques Rancière, *Dissensus: Politics and Aesthetics*, ed. and trans. Steven Corcoran (London: Bloomsbury, 2010): p. 31.

subjectivity: in the same way that the sponsors of Gramm-Leach-Bliley could not foresee the emergence of Occupy Wall Street, we cannot foresee the claims that will emerge in reaction to our own deliberative conclusions in the present. In the same way that Habermas views the “philosophy of the subject” as a dangerous extension of substantial ethical life into collectively binding political orders, I view a non-futurity-based model of democratic legitimacy as a dangerous reification of our own ethical prejudices as the unchanging self understanding of the democratic state.

By returning to the philosophy of the subject, then, I am not returning to a theory of the state in which the sovereign subject must be continually present for popular sovereignty to retain its force; under a future-oriented model of democratic legitimacy, that would be impossible. The concrete reality of subjects and their particular interests matters in a way that it does not in a purely subjectless form of communication, but that communication is nevertheless decentered or free-floating on a temporal dimension. Like Habermas, I still “interpret [popular sovereignty] intersubjectively,” but that intersubjectivity always extends into the future.⁵²

Second, I understand the (N) principle as a transnational radicalization of Habermas’s territorially bounded discourse theory of law and democracy. As I discussed in earlier chapters, the original discourse and universalization principles had cosmopolitan features that were jettisoned when Habermas made the democratic principle explicit in *Between Facts and Norms*. While the earlier principles made it clear that norms must be approved by “all affected,” the democratic principle revised the field of discursive participants to “citizens.”⁵³ Redirecting “citizens” to “next affected” suggests that democratic legitimacy depends on more than

⁵² Jürgen Habermas, *Between Facts and Norms: Contributions to a Discourse Theory of Law and Democracy*, trans. William Rehg (Cambridge, Mass.: The MIT Press, 1996): p. 301.

⁵³ Jürgen Habermas, “Discourse Ethics,” in *Moral Consciousness and Communicative Action*, trans. Christian Lenhardt and Shierry Weber Nicholsen (Cambridge, Mass.: The MIT Press, 1990): pp. 65-66; Habermas, *BFN*: p. 110.

deliberation within the borders of a single nation-state, and redirecting from “all affected” to “next affected” avoids some of the logical problems with defining the demos based on affectedness. It is not incoherent (as Robert Goodin says the traditional formulation of “all actually affected interests” would be), because it does not require an *ex ante* determination of affectedness before the democratic process can even commence.⁵⁴ And it is also not overly expansive (as Goodin concedes his own “all possible affected interests” may be), as it turns on concrete affectedness in the future rather than an indeterminate judgment of who may be affected under status quo conditions.⁵⁵ Rather, it takes a pragmatic stance with the present (those who are entitled to vote) and defers maximal inclusion into the future.

Moving forward, the questions of the subject and the transnational character of political compromise are where the most work remains to be done. Ultimately, these are both questions of application: if we don’t know who the next affected party is in advance, how can we tailor democratic decisions in a way that caters to them? And, much like the “all affected” principle, the question of what kind of affectedness counts is difficult to answer with perfect clarity or universal scope; I have tried to answer this question by pointing to “deep dissent” as the most democratically significant form of affectedness, but such narrow tailoring is certainly subject to potential critiques (e.g. What about material affectedness? Or affectedness that is unrecognized by the affected? Etc.). (N)’s transnationalism is a similarly thorny practical problem. While it is not logically incoherent, it still runs into the design problems of international democratic institutions—while it is easy to say that informal opinion-formation can be marshaled at the international level, will-formation is still bounded by the Westphalian system.

⁵⁴ Robert Goodin, “Enfranchising All Affected Interests, and Its Alternatives,” in *Philosophy and Public Affairs* 35 (2007): pp. 52-53.

⁵⁵ *Ibid.*: pp. 53-55.

Considering the pragmatic ring of the word “compromise,” it may come across as odd that I describe compromise and dissent as a radical model of democracy. Radicality, however, is built into both the structure of compromise itself and into the normative core of deliberative democracy. While there is more work to be done, I hope at least that I have illustrated that compromise and dissent magnifies that radical potential.